TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 458.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JULY 29, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 458.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Indictment	2	1
Demurrer to indictment	3	2
Opinion of the court, Rose, J.	8	5
Order of court sustaining demurrer to indictment	11	6
Judgment	12	7
Petition for a writ of error	13	7
Order allowing writ of error	13	8
Assignment of errors	15	8
Stipulation of counsel as to making up transcript of record	15½	9
Writ of error	16	9
Citation	17	10
Order to transmit record	18	11
Clerk's certificate	18	11

1 UNITED STATES OF AMERICA,

District of Maryland, to wit:

At a district court of the United States for the District of Maryland, begun and held in the city of Baltimore on the first Tuesday in June (Being the 3rd day of the same month), in the year of our Lord one thousand nine hundred and nineteen.

Present: The Honorable John C. Rose, judge Maryland district; Samuel K. Dennis, Esq., attorney; William W. Stockham, Esq., marshal; Arthur L. Spamer, clerk.

Among other were the following proceedings, to wit:

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED, a corporation. | Criminal Docket. No. 2376.

Be it remembered, that heretofore, to wit, at a District Court of the United States for the District of Maryland, begun and held on the first Tuesday of June, 1919, George A. Colston, Alfred S. Day, John G. Crane, Louis H. Kruger, Clarence H. Smith, George R. Curtis, Samuel J. Braun, William H. Ashley, John V. Murphy, Richard J. Bloxham, William B. Cassell, Charles A. Euker, William E. Hearn, Charles F. Weyforth, Albert Gibson, William Christian, Gifford E. Blaylock, and Frederick L. Young, good and lawful men of the district aforesaid, who being impaneled, sworn, and charged to inquire for the United States of America for the body of the district aforesaid, having withdrawn from the bar of the court here, afterwards, to wit, on the 11th day of June one thousand nine hundred and nineteen, present to the court here the following indictment, to wit:

2 *Indictment.*

Filed June 11, 1919.

In the District Court of the United States for the district of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED, a corporation.

The grand inquest of the United States of America, in and for the district of Maryland, inquiring for the body of said district, do on their oath present that the Standard Brewery, Incorporated, a body corporate, duly incorporated, late of said district, heretofore, to wit, on the fourth day of June, in the year of our Lord nineteen hundred and nineteen, at Baltimore, in the State of Maryland and district aforesaid, did unlawfully use certain grains, cereals, fruit, and other food products, to wit, one hundred and ninety-five bushels of malt and one hundred and sixty pounds of hops and two thousand

pounds of grits in the manufacture and production of a large quantity of beer, to wit, two hundred and fifty barrels of beer for beverage purposes, which said beer so manufactured and produced as aforesaid then and there contained as much as one-half of one per cent of alcohol by both weight and volume; contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States.

SAMUEL K. DENNIS,
United States Attorney.

Act November 21, 1918, sec. 4.
Which said indictment is thus endorsed:
A true bill,

GEORGE A. COLSTON,
Foreman.

June 11th, 1919.
Witness:
CARL BROHMEYER.

3 And thereafter, the said Standard Brewery, Incorporated, a corporation, on the 20th day of June, 1919, filed the following demurrer to the said indictment, to wit:

Demurrer to indictment.

Filed June 20th, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED.

Demurrer.

Standard Brewery, Incorporated, the defendant herein, by its attorneys, demurs to the indictment herein and says that the same is bad in substance and insufficient in law.

And for grounds of said demurrer the defendant says:

1. That said indictment fails to allege the doing of anything or the commission of any act which is forbidden by or contrary to any law or statute of the United States.

2. Said indictment fails to allege sufficient facts to constitute a violation of any law or statute of the United States.

3. No law or statute of the United States forbids or makes unlawful or did forbid or make unlawful on June 4th, 1919, the use of grains or other food products, as alleged in the indictment, in the manufacture or production of beer for beverage purposes containing

as much as one-half of one per cent of alcohol by both weight and volume.

4 4. The act or thing charged in the indictment is not forbidden or made unlawful by any law or statute of the United States unless the beer so produced is intoxicating, and the indictment fails to allege that the beer so made was in fact intoxicating.

5. The act of Congress of the United States approved November 21st, 1918, a violation of which is charged in the indictment, relates only to beer which is in fact intoxicating, and the indictment fails to allege that the beer manufactured was in fact intoxicating.

6. The aforesaid act of Congress does not make unlawful, as charged in the indictment, the use of food products in the manufacture of beer for beverage purposes "containing as much as one-half of one per cent of alcohol both by weight and volume"; it makes no reference to the percentage of alcohol contained, nor does it even refer to the presence of alcohol, but makes the test solely whether the beer so made is or is not in fact intoxicating.

7. The aforesaid act of Congress is, so far as it may be construed to forbid the use on June 4th, 1919, of food products in the manufacture of beer for beverage purposes, unconstitutional and void, in that Congress had at the time of the passage of the act no power to forbid such use or manufacture unless the same was necessary as a "war measure," for the public security, and on June 4th, 1919, no war affecting the United States was in progress nor did any public necessity or emergency exist requiring or justifying such prohibition.

8. The aforesaid act of Congress relates, so far as it prohibits the use of food products in the manufacture of beer for beverage purposes, only to beer of the kind commonly supposed or understood to be intoxicating beer, and beer containing as small a percentage

5 of alcohol as that charged in the indictment, to wit, one-half of one per cent both by weight and volume, is not commonly supposed or understood to be intoxicating beer, and is therefore not the kind of beer referred to in the act in question.

9. The aforesaid act of Congress of the United States approved November 21st, 1918, provides that nothing therein shall be construed to interfere with the power conferred upon the President under section 15 of the food-control act of August 10th, 1917. In pursuance of the power conferred upon him by said food-control act the President did by his proclamations issued January 30th, 1919, and March 4th, 1919, permit the use of grain and food products in the manufacture of malt beverages, which are not in fact intoxicating, and said act of November 21st, 1918, therefore does not prohibit and has not prohibited since the issuance of said proclamations, the use of such grain or food products in the manufacture of beer or other malt liquor which is not in fact intoxicating.

10. The indictment undertakes improperly and without justification in law to define the kind of beer referred to in the act of Congress of the United States approved November 21st, 1918, whose

violation is charged in the indictment. The attempted definition "beer containing as much as one-half of one per cent of alcol both by weight and volume." No such definition is contained in intended by or reasonably to be construed to be implied in the in question, but said definition of "beer" as used in the said indi ment is based solely on the test or standard applied in laws or re lations relating solely to matters of revenue or taxation.

11. The aforesaid act of Congress approved November 21st, 19 applies only to "beer," wines, or other intoxicating malt or vin liquors for beverage purposes." The indictment fails to allege fa
from which it may be reasonably understood or assumed th
6 the beer referred to in the indictment was "an intoxicati
liquor," and therefore fails to charge facts constituting a v lation of the act.

12. The aforesaid act of Congress declared the "beer" there referred to to be "an intoxicating malt liquor," and hence refers, a was intended to refer, only to the kind of beer which is "intoxicati beer," and the kind of beer set forth in the indictment, to wit, th containing "as much as one-half of one per cent of alcohol," n only is not alleged and can not be assumed to be "intoxicating," b in fact is and must be judicially recognized to be nonintoxicati and therefore is not the kind of beer referred to or prohibited by t act in question.

13. The aforesaid act of Congress, in so far as it forbids the u after May 1st, 1919, of food products in the manufacture for bevera purposes of "beer, wine, and other intoxicating malt or vino liquors," does not purport to be a food-conservation statute, but measure designed to conserve the man power of the Nation by p venting the use of intoxicants, and the indictment fails to allege a facts showing that the defendant manufactured for beverage pu poses any intoxicating beer or intoxicant of any kind, or that t "beer" so made by it was or is of the kind referred to and intend to be reached by said act.

14. The aforesaid act of Congress approved November 21st, 19 in so far as it purports to apply to the production, manufacture, sale of beer, wine, or other intoxicating malt or vinous liquor beverage purposes is unconstitutional and void because in excess and unauthorized by any power delegated to or vested in the C gress or any department or officer thereof under and by virtue of t Constitution of the United States.

7 15. And for other grounds to be assigned at the hearing

ELIHU ROOT,
WM. D. GUTHRIE,
W. L. RAWLS,
RANDOLPH BARTON, JR.,
WM. L. MARBURY,
Attys. for Defendant

Which said demurrer to the indictment the court sustained, and thereupon, on the 1st day of July, 1919, filed the following opinion, to wit:

8 *Opinion of the court.*

Filed July 1, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA

vs.

STANDARD BREWERY.

ROSE, *District Judge:*

According to the dictionary beer is an alcoholic beverage resulting from the fermentation of cereals or other starchy substances. To be beer it must contain alcohol. If it contains so little that nobody wants it because of the alcohol in it, it is not beer from any practical standpoint. The Internal Revenue Department, years ago, had to deal with this question. The statute taxed all fermented liquors. When was a liquor fermented? The department answered that fermentation had not taken place enough to make it within the taxing meaning of the words "a fermented beverage" unless it resulted in an alcoholic content of at least one-half of one per cent. If Congress had forbidden anyone to sell beer or other fermented liquor, beer containing one-half of one per cent or more of alcohol would have been covered by the statute. Congress has not used those words. It has used others which may mean that it intended to forbid the making and sale of nothing which is not intoxicating. I must confess that my mind has a tendency towards what might be called a historical rather than the more or less artificial legal construction of such an enactment. I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what

9 they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I can not now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the second circuit have each expressed the opinion

that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges but because they are usually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall therefore sustain the demurrer. What is the practical effect of so doing? It is merely this, until the Supreme Court decides differently prosecutions are not likely to be instituted in this district against any man for selling any fermented or vinous liquor which is not intoxicating. If he sells any that is intoxicating he breaks the statute and can, and I suppose will, be immediately prosecuted. It may be well for all to bear in mind that I have not decided, nor, so far as I know, has anyone as yet decided, that two and three-quarter per cent beer is not intoxicating. All that has been determined on that question is that the affidavits presented by the brewers in New York that it is not were strong enough to induce the United States Court to
10 restrain the collector of internal revenue from refusing to sell stamps, etc., to the brewers of that beverage. If anyone makes or if anyone sells it, and the jury shall determine that what he made or sold is intoxicating, he will be liable to the penalty, and is liable, I take it, in New York, as anywhere else. Moreover, if the Supreme Court shall ultimately decide that the Government's contention is right, anyone who now sells any beer containing one-half per cent or more of alcohol will be then subject to indictment for everything he has done in that respect since July first.

I do not know that anyone is forced to sell such beer or to make it, and if he takes the chance, and sells it to make money by so doing, and the Supreme Court concludes that he has broken the statute, he has no claim to special leniency of treatment.

And thereupon the court entered the following order sustaining the said demurrer on the 2nd day of July, 1919, to wit:

11 *Order of court sustaining demurrer to indictment.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED.

The demurrer to the indictment in the above entitled case coming on to be heard, and having been fully argued by counsel for the

nited States and for the Standard Brewery, Incorporated, it is reby adjudged, ordered, and decreed by the District Court of the nited States for the District of Maryland, this second day of July, 919, that the demurrer be, and the same is hereby, sustained, be- use the indictment found in said cause alleges no facts sufficient nder the true construction of the act of Congress approved Novem- er 21, 1918, section 4, chapter 212, to constitute an offense against he United States

JOHN C. ROSE,
District Judge.

2 *Judgment.*

Whereupon all and singular the premises being seen, and by the court here fully understood for that it appears to the court here that the said indictment and the matters therein contained are not sufficient in law to compel the said Standard Brewery, Incorporated, a corporation, to answer thereto, and that no process upon the said indictment ought by the law of the land to be made against it; therefore it is considered by the court here that the said Standard Brewery, Incorporated, a corporation, be dismissed and discharged of the said indictment, and that it go thereof without day.

13 *Petition of United States for a writ of error to the Supreme Court of the United States and order of court granting writ of error.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* STANDARD BREWERY, INCORPORATED, defendant in error.	At Law. Petition for writ of error.

And now comes the United States of America, the plaintiff in error herein, by Samuel K. Dennis, United States attorney, and says:

That on or about the second day of July, in the year 1919, the District Court entered a judgment herein in favor of the defendant and against the plaintiff, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the

record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

SAMUEL K. DENNIS,
U. S. Attorney,
JAMES A. LATANE,
Asst. U. S. Atty.,
Attorneys for Plaintiff in Error.

14 Upon the foregoing petition, it is ordered by the District Court of the United States for the District of Maryland, this 2nd day of July, 1919, that a writ error from the Supreme Court of the United States, be and the same is hereby allowed as prayed.

JOHN C. ROSE,
U. S. District Judge.

15 *Assignment of errors.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *vs.* THE STANDARD BREWERY, INCORPORATED, defendant in error.	Assignments of errors.

The plaintiff in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exists:

First: The court erred in sustaining the demurrer to the indictment, and holding and deciding that the indictment did not state facts sufficient to constitute an offense against the United States under the true construction of the provisions of the act of November 21, 1918, section four, 2nd session, 65th Congress, chapter 212.

Second: That the court erred in sustaining the demurrer of the defendant in error to the indictment, on the ground that under the true construction of the said act the indictment charges no offense against the United States.

Third: That the court erred in rendering judgment against this plaintiff in error upon sustaining the demurrer of the defendant in error.

Wherefore the plaintiff prays that said judgment be reversed.

SAMUEL K. DENNIS,
United States Attorney.
JAMES A. LATANE,
Asst. U. S. Atty.
Attorneys for Plaintiff in Error.

15 *Stipulation of counsel as to making up transcript of record on appeal.*

Filed July 15th, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INC. } No. 2376 Criminal Docket.

It is hereby stipulated and agreed by and between the parties to the above entitled case, that the transcript of record on the appeal by the United States to the Supreme Court of the United States, shall consist of the following, viz:

1. Indictment.
2. Demurrer to indictment.
3. Opinion of the court.
4. Order of court sustaining demurrer to indictment.
5. Petition of United States for writ of error and order of court thereon.
6. Assignment of errors.
7. Writ of error.
8. Citation.
9. Order to transmit record.
10. Clerk's certificate.

SAM'L. K. DENNIS,
U. S. Attorney.
W. L. MARBURY,
W. L. RAWLS,
RANDOLPH BARTON, JR.,
Attorneys for Defendant.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the District Court of the United States for the District of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Standard Brewery, Incorporated, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears. We being willing that error, in any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of July, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] ARTHUR L. SPAMER,
Clerk of the District Court of the United States
for the District of Maryland.

Allowed by
JOHN C. ROSE,
U. S. District Judge.

17 UNITED STATES OF AMERICA, *ss:*

To Standard Brewery, Incorporated, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Maryland, wherein United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this second day of July, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] JOHN C. ROSE,
U. S. District Judge.

Attest:

ARTHUR L. SPAMER,
Clerk District Court of the United States
for the District of Maryland.

Service of the within citation acknowledged this 2d day of July, 1919.

W. S. MARBURY,
Attorney for Standard Brewery (Incorporated),
Defendant in Error.

Order to transmit record.

n pursuance of the writ of error aforesaid, and according to the
tute in such case made and provided, and of the Order of Court
e, a record of the judgment aforesaid, with all things thereunto
ating, together with the said writ of error annexed, is hereby
nsmitted to the said Supreme Court of the United States, ac-
dingly.
Teste:

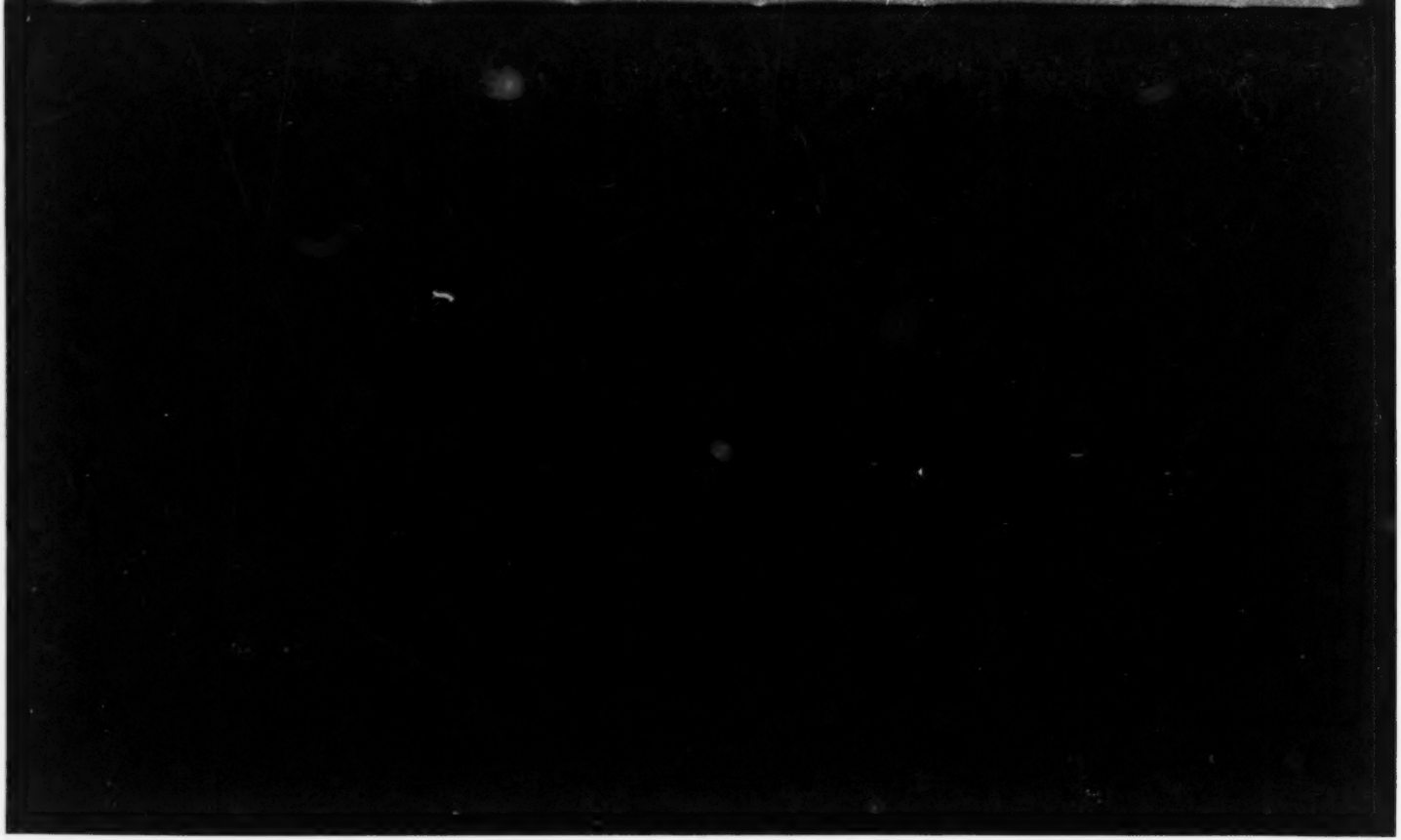
ARTHUR L. SPAMER,
Clerk.

Clerk's certificate.

ITED STATES OF AMERICA,
District of Maryland, to wit:
I, Arthur L. Spamer, clerk of the District Court of the United
ates for the District of Maryland, do hereby certify that the fore-
ing is a true transcript of the record and proceedings of the said
strict Court, together with all things thereunto relating made up
accordance with the stipulation of counsel, incorporated therein,
the therein entitled cause.
In testimony whereof, I hereunto set my hand and affix the seal
said District Court, this 16th day of July, 1919.
[SEAL.] ARTHUR L. SPAMER,
Clerk.

(Endorsement on cover:) File No. 27213, Maryland D. C. U. S.
erm No. 458. The United States of America, plaintiff in error, *vs.*
andard Brewery, Incorporated. Filed July 22d, 1919. File No.
213.

○



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, Plaintiff in error,
v.
STANDARD BREWERY, INCORPORATED.
No. 458.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, respectfully moves the advancement of the above-entitled cause for early hearing during the present term.

The case involves the construction of that portion of the Act of November 21, 1918, 40 Stat. 1045, forbidding the use after May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, of grains or other food products in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. The indictment alleged the use of certain grain and other food products in the manufacture of beer containing "as much as one-half

138055—19

of one per cent of alcohol by both weight and volume." A demurrer was interposed thereto and sustained on the ground that beer containing such percentage of alcohol was not an intoxicating liquor within the meaning of the statute.

The question involved is one of general public importance. Numerous cases are pending in the United States courts which would be controlled by the Court's decision herein. Other Federal courts have passed upon the matter and conflicting decisions have resulted. It is important, therefore, that an early decision may be had in the instant case.

Notice of this motion has been served on opposing counsel.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

○

FILED
DEC 11 1920
JAMES D. MAHER,
CLERK.

NO. 468

In the Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF AMICUS CURIAE FOR THE UNITED STATES

WATSON D. WILLSON,
ANDREW WILSON,
Attorneys Amicus Curiæ.

PRESS OF BYRON S. ADAMS, DC.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error
v.
STANDARD BREWERY,
INCORPORATED.

No. 458.

In Error to the District Court of the United States for the District of Maryland.

BRIEF AMICUS CURIAE FOR THE UNITED STATES on construction of War Prohibition Act.

Agreeable to the permission of the Court this brief is filed as Amicus Curiae in the hope that some of the authorities cited and reasons given may prove helpful in determining what is the proper construction to be placed upon the War Prohibition Act.

POINTS AND AUTHORITIES.

I.

The War Prohibition Act prohibits beer and wine containing two and three-fourths per cent alcohol by weight and three and three-tenths per cent alcohol by volume, regardless of their intoxicating qualities. (War Pro-

hibition Act passed November 21, 1918, Sec. 15), *U. S.* v. *Cohn*, 52 S. W. Rep. 438; *LaFolllette* v. *Murray*, 81, Ohio State 474, 91 N. W. Rep. 294; *State* v. *Walder*, 83 Ohio State 68; *State v. Williams*, 11 S. D. 64; *State* v. *Ely*, 22 S. D. 487.

II.

Similar statutes enacted by Congress and State legislatures have been construed to include all beer and wine without reference to their intoxicating quality. *U. S.* v. *Cohn*, 52 S. W. Rep. 438; *LaFollette* v. *Murray*, 81 Ohio State 474; *State* v. *Williams*, 75 N. W. 815.

III.

The uniform policy of Congress has been to prohibit beer and wine without reference to the intoxicating quality of such liquors. Army Canteen law. 31 Sta. L. 758; law against sale of liquor to Indians, 29 Sta. L. 506, etc.

IV.

Beer amendments offered to War Prohibition Act, District of Columbia, and defeated.

V.

Rules of construction to be applied in determining what is included in the act; that the act may be enforced; that it may carry out the purpose of the act; the conditions under which it was enacted and the evil to be remedied.

DOES THE PHRASE "OTHER INTOXICATING MALT OR VINOUS LIQUOR" REQUIRE BEER AND WINE TO BE INTOXICATING TO COME WITHIN THE PROVISIONS OF THE LAW?

It is contended that the phrase "other intoxicating malt or vinous liquor" limits the word "beer and wine" and unless beer and wine are intoxicating in fact, they do not come within the provisions of the law. This construction is not tenable for the following reasons: The word "no" before the phrase, "grain, cereals, etc.," and before the term "beer, wine, etc.," makes clear the intention of Congress to place no limitation upon the prohibition. If Congress had intended that only intoxicating beer and intoxicating wine was prohibited after July 1, they would have stated that intoxicating liquors were prohibited and added nothing further, but Congress intended and did go further than that and included beer and wine whether intoxicating or not. Every member of Congress knew that the courts had repeatedly held that a legislative body may define what is intoxicating liquor and include within the definition specific kinds of liquors that would not be classed as intoxicants if they were within the definition. In the face of these decisions Congress deliberately specified beer and wine as within the prohibition.

To construe this act to permit the sale of beer and wine would be a direct contradiction of the plain terms of the statute. If Congress did not intend to prohibit every kind of beer and wine, why did they use the language "No beer, wine, etc.," shall be sold after June 30th? When beer and wine have been singled out and specified in a legislative act the uniform rule of construction has been to include all kinds of beer and wine without reference to the percentage of alcohol contained in them.

CONSTRUCTION OF SIMILAR STATUTES.

Section 8, providing punishment for the sale of liquor to the Indians, Volume 3, Federal Statutes Annotated, page 917, reads as follows: "That any person whether an Indian or otherwise who shall in said territory manufacture, sell, give away, or in any manner or by any means furnish to anyone either for himself or another ANY VINOUS, MALT OR FERMENTED LIQUORS OR ANY OTHER INTOXICATING DRINKS OF ANY KIND WHATEVER, etc." This statute has been in operation for many years and has been construed by the Federal Court to include non-intoxicating malt liquor. In the case of *United States* v. *Cohn*, decided in 1899, 2 Indian Territory, 474, 52 S. W. Rep. 438, it was held that the sale of non-intoxicating malt liquor was a violation of this act, notwithstanding the use of the word "other" before the words "intoxicating drink." This decision is reinforced by the language in this statute which says "no beer, wine, etc." Inasmuch as Congress has the right to define intoxicating liquor and stated specifically that no beer, wine, etc., should be sold, it was clearly intended that all beer and wine, whether intoxicating or not, should come within the provisions of the statute. The word "other" in a statute is sometimes construed to limit the provision last named to the same class as those first named. Such a construction in this case would mean only that all malt and vinous liquors which are not wine or beer must be intoxicating liquor. There may be malt or vinous liquors that are not beer and wine which come within the classification "malt and vinous liquors," but this will not in any way permit the sale of that which is beer and wine as contemplated by Congress. This same language has been

interpreted by the Supreme Court of Ohio in determining the liability of a liquor dealer for the payment of the liquor tax. In 1910 the liquor tax law in Ohio read as follows: "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed, etc., a tax in the sum of one thousand ($1,000) dollars. The Supreme Court of Ohio construed this statute in the case of *La Follette* v. *Murray*, 81 Ohio State, 474; 91, N. E. Rep. 294. The court in its decision called attention to the fact that the law had been amended and it formerly read "any intoxicating liquor," but as it then stood it read "spirituous, vinous, malt or other intoxicating liquor." Calling attention to the fact that it was contended under the former provision that the word "malt" qualified the words "intoxicating liquors" and not the word "liquor." The court said: "The decision was not grounded upon the use of the word "any," but if the Legislature intended such an important change as the exemption of non-intoxicating vinous and malt liquors from the tax, it would have clearly expressed its intention. We must conclude that the meaning of the section was not changed by the substitution of the word "other" for the word "any." The court held that the sale or traffic in malt liquors, whether intoxicating or not, came within the provisions of the law. Following this decision the Legislature in Ohio passed a local option law prohibiting in dry territory intoxicating liquor under the following definition: "The phrase 'intoxicating liquors' as used in this act shall be construed to mean any distilled, malt, vinous, or any intoxicating liquor whatever." The court discussed somewhat at length the former decisions where the words "other intoxicating liquors" and "any intoxi-

cating liquor" followed specific terms. This case was very bitterly contested, as it involved the enforcement of a local option law which was effective in most of the counties. The undersigned presented the argument in this case. It was decided against the construction for which we contended in the Circuit Court and the strongest decision was written in harmony with that theory of the law that we have ever read. The case was taken to the Supreme Court and that court reversed the Circuit Court and held that the phrase "intoxicating liquor" as used in the local option law should be construed to mean any distilled, malt, or vinous liquor, whether it is intoxicating or not. In discussing the near-beer phase of the question, the court said:

"The legislative fiat has gone forth that malt liquor is intoxicating within the meaning of the act, and that is the end of it. If the law is wrong, it is for the Legislature, and not the court, to correct it, but it was enacted no doubt to cover such evasions as have been tried in many localities."

Two cases from South Dakota are in point.

The case of *State* v. *Williams* 11 S. D. 64—75 N. W. 815, construes language similar to that found in the War Prohibition Statute. In the use of the term "or other intoxicating liquors" following the designation of "spirituous, vinous, malt, termed fermented," clearly indicate in our opinion that it was the intention of the legislation to class all the liquors mentioned as intoxicating."

See also *State* v. *Ely*, 22 S. D. 487.

Sec. 2834 requires a license to engage in the business of selling any spirituous, vinous, malt, brewed or other intoxicating liquors.

Held "upon showing that the liquors sold were of the class named, the state need not prove that they were intoxicating."

If this construction is placed upon a criminal law relating to intoxicating liquors, there is good reason for apply ing the construction even more rigidly in a law which was to conserve the food, fuel, transportation facilities and man-power for the support of the Army and the maintenance of the Navy in a war emergency.

The application of the rule of ejusdom generis will not avail opposing counsel in this case. At best it is only a rule of construction to aid in arriving at the real legislative intent. It has never been a cast-iron rule, nor does it override all other rules of construction. It is never applied to defeat the real purpose of the statute such as may be gathered from the whole instrument.

See *U. S.* v. *Mescal* 215, U. S. 26. Fed.

See also in re Stege (C. C. A.) 116-344:

"Counsel for defendant invokes the rule of ejusdom generis, and says that the words 'Any other person' are confined by the earlier specifications of the section, to those who are engaged in the carriage of the liquors either as principal or employee. The rule invoked is not much in favor at the present time. Stroud's Judicial Dictionary, after a full review of the English authorities on the subject, says: 'It may be doubted whether the rule is of much practical value at the present day.' *U. S.* v. *First Nat. Bank of Anamoose*, 190 Fed. 336. See Sutherland Stat. Construction, Vol. 2, Sec. 437–439. Black Interpretation of Law, page 215.

In this act Congress clearly intended to prevent the use of any grain or food products from being made into beer during the period named and to prevent the sale of beer and wine under the prohibition act. It is inconceivable

that Congress would enact a law to save food and leave in it a provision that would permit the waste of food material by the making of beer which contains less than two and three-quarters per cent alcohol. No State or Federal law contains such a provision. Practically all of them prohibit all distilled, malt and vinous liquors. Some of them prohibit all alcoholic liquors and practically all of the rest prohibit intoxicating liquors containing more than one-half of one per cent alcohol To construe this law to permit that which every prohibition law in operation prevents would be an unwarranted construction.

THE UNIFORM POLICY OF CONGRESS HAS BEEN TO PROHIBIT BEER AND WINE WITH OTHER INTOXICATING LIQUORS.

The uniform policy of Congress has been to specifically prohibit beer and wine along with other intoxicating liquors. This policy was made prominent when the sale of liquor was prohibited in the Army Canteen. Nothing but beer and wine was served in the Post Exchange or Canteen. The Army Canteen Law, Section 38, 31 Stat. L. 758, provides "The sale of or dealing in beer, wine or other intoxicating liquors by any person in any Post Exchange or Canteen * * * is hereby prohibited." See also the Prohibition Enforcement Act for Indian Territory, January 30, 1897, Chapter 109, 29 Stat. L. 506, provides that any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor, including beer, wine, or any other ardent or intoxicating liquor," etc., * * * shall be punished by imprisonment. See also Wilson Law regulating Interstate Commerce which provides "that all fermented, distilled or other intoxicating liquors, etc." See 238 of the Code relating

to c. o. d. packages, which provides that "who shall unknowingly deliver or cause to be delivered * * * to any person under a fictitious name any spirituous, vinous, malted, fermented, or other intoxicating liquor," etc. Beer is a malted liquor and wine is a vinous liquor and they were included in the prohibition. In several of the acts beer and wine were specifically mentioned just as they were in the War Prohibition Act. In nearly every prohibition measure that has come before Congress the question has been raised by friends of beer and wine and in every instance Congress has voted against such exemption and on the other hand specifically included beer and wine, either by name or under the term "malt, vinous, or fermented liquors." The following from the Congressional Record shows the uniform policy of Congress in including beer and wine in all prohibition measures.

BEER AMENDMENTS TO NATIONAL PROHIBITION.

Vol. 55, part 6, Congressional Record, Sixty-fifth Congress, pages 5663 and 5664, August 1, 1917, Mr. Phelan offered amendment which was recorded on page 5659 and reads as follows:

Article—.

Section 1. The manufacture, sale, or transportation of distilled spirituous liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited: Provided, That this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, on or before the first day of July, A. D. 1927.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

This amendment eliminated the words "intoxicating liquors" from Article 18, as it was finally adopted, and substituted "distilled spirituous liquors." This was done to make possible the sale of beer and wine. The amendment was defeated by a viva voce vote. See page 5664. The record is made on the same page that Mr. Newlands offered the same amendment as follows:

Mr. Newlands: I move that the joint resolution be amended by substituting the word distilled for the word intoxicating, in line 10, page 1, so that the article will read as follows: Section 1. The manufacture, sale or transportation of distilled liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The yea and nay vote on the amendment to exclude beer and wine by Mr. Phelan was rejected by a vote of 22 yeas and 57 nays. See page 5664.

BEER AMENDMENT TO WAR PROHIBITION.

On page 4181 the following amendment was offered by Mr. Church:

Amend section 13, by adding at the end thereof the following: "Provided, Nothing herein contained shall prohibit the manufacture of wine containing no grain products."

Another amendment was offered and was pending at the same time by Mr. Sabath as follows: (p. 4181.)

Amendment by Mr. Sabath: Page 15, after the word "both," in line 24, insert:

"Provided, That nothing contained in this section shall prohibit the manufacture or use of wines or beer."

The vote was taken on Mr. Sabath's amendment and the amendment lost. On a division demanded by Mr.

Sabath there were 88 yeas and 130 nays. Mr. Parker of New Jersey then moved to strike out all of section 13 which related to the War Prohibition matter. The Chair announced that the nays appeared to have it. On a division demanded by Mr. Parker there were 119 ayes and 127 nays. On a yea and nay vote there were 138 yeas and 152 nays.

AMENDMENT TO DISTRICT OF COLUMBIA TO EXEMPT WINE.

Congressional Record, Vol. 54, part 2, page 1060, Mr. Phelan of California offered an amendment as follows:

"Mr. President pro tempore. The secretary will read the amendment offered by the Senator of California (Mr. Phelan).

The secretary. On page 2, line 10, strike out the words 'wine, ale, porter, beer,' so that if amended it will read: 'Wherever the term "alcoholic liquors" is used in this act, it shall be deemed to include whisky, brandy, rum, ale, gin, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, all malt liquors, and all other alcoholic liquors.'

Mr. Phelan. Mr. President, it has just occurred to me during the course of this debate that, inasmuch as there is apparently wide divergence of opinion among the Senators, a compromise might be reached, whereby the good people of the District would not be denied those privileges which are enjoyed by the men and women of Europe to have at their meals, wherever they take their meals, whether it be in residence, club, or hotel, light wines or light beers, which the experience of Europe teaches us are not, in practice, intoxicating."

On page 1066 the Record shows that Mr. Phelan attempted to exclude ale, wine, beer, and porter from the District of Columbia Bill. The record is as follows:

"Mr. Vardaman. Mr. President, I rise to a point of order. The amendment has already been rejected. The Senator from California offered the amendment to the Underwood amendment striking out beer and wine (light) and he offers this amendment with that stricken out. The Senate has already acted upon the question.

"Mr. Phelan. In my previous amendment I accepted hard or fermented cider at the suggestion of the Senator from New Hampshire, and I exclude that now. So it rests now, simply on ale, wine, beer, and porter, and not hard or fermented cider—a substantial change.

"Mr. Stone. Mr. President, I address myself to the Senator from California. I was called out when he was offering his amendment. The Senator, as I recall it, voted against the referendum. How did the Senator vote?

"Mr. Phelan. The Senator from California voted for the Underwood referendum amendment with the intention, had it provided, of offering this as an alternative, so that the people of the District might vote either for all liquors or simply for wines and beers. Now, the referendum amendment having failed, although my vote was cast for it, I offer independently, as a new referendum, the amendment on the desk. It is not the same as my original amendment either in form or substance.

"Mr. Vardaman. I insist on my point of order.

"Mr. President pro tempore. The Chair understands the Senator from California offered this amendment, as in Committee of the Whole, to the Underwood amendment.

"The President pro tempore. The Chair, subject to the right of appeal by the Senator from California, will rule that the amendment is out of order, as having been offered.

"Mr. Phelan. I appeal from the decision of the Chair on the question of order. I submit that what I have now

submitted differs in substance from the original amendment.

"The President pro tempore. The question is, Shall the decision of the Chair stand as the judgment of the Senate? (Putting the question.) The ayes appear to have it. The ayes have it, and the decision of the Chair is sustained. If there is no further amendment to be proposed, the bill will be ordered to be engrossed for a third reading and read the third time. The bill was ordered to be engrossed for a third reading, and read the third time."

These illustrations might be multiplied. There never has been a vote in Congress on this issue when Congress excluded beer and wine from prohibition laws. In every instance both the discussion and the vote and the wording of the law make clear that all kinds of beer and wine are intended to be prohibited by the Federal Prohibition Acts.

RULES OF CONSTRUCTION TO BE APPLIED TO THE WAR PROHIBITION ACT.

The first well-settled rule of construction is that:

"The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced.

The meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the legislature to express its will are adequate to the purpose and do express that will correctly." (Black on Interpretation of the Law, page 45.)

LANGUAGE.

The language in question in this case is clear, inclusive and exclusive. The statute says: "No beer, wine," etc. That is as simple and utter negation as words can frame. Beers have always differed in their alcoholic content as Congress knew, and this language forbids them all. So

determined was the Congress that there should be no mistaking its meaning that the usual language of such statutes, "beer, wine," etc.—under which less vigorous phrasing all kinds of beer and wine have long been ruled to be prohibited—was put aside and the more terse, emphatic and undebatable words "no beer" selected. The very unusualness of the phrasing may well be considered to represent conscious and deliberate effort on the part of Congress to be superlatively inclusive and emphatic. With respect to such words there can be no doubt. To argue otherwise not only bends but breaks the vehicles of intelligent intercourse. Clearly, no beer or wine can be manufactured or sold under the wording of this act.

SCOPE AND PURPOSE OF THE ACT.

A second rule of construction is stated as follows:

"Every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." (Black on Interpretation of the Law, page 76.)

The emphatic and inclusive phrasing heretofore noted fits perfectly the intended scope and purpose of this legislation.

The wording expresses the purpose and the purpose justified the words. Congress was herein adopting further legislation for the conservation of food, fuel and manpower. By previous legislation the administrative branch of the government had been empowered to limit the accustomed activities of individuals in ways unprecedented. Flour and sugar were sparingly and stringently allotted to each individual, and numerous other limitations placed

upon eating and drinking. The Act under consideration was an additional conservation Act, and it would be inconsistent with its clear intent to construe it as permitting the continued use of coal, grain and man-power in the manufacture of any variety of a beverage expressly forbidden by the Act as one involving waste, which waste is a basic assumption and implied delcaration of this Act and not properly a matter to be debated before this court.

THE HISTORY AND CONDITIONS UNDER WHICH THE LEGISLATION WAS PASSED SHOULD BE CONSIDERED.

"In construing a statute, the courts may recur to the history of the times when it was passed, in order to ascertain the reason for its passage as well as the meaning of its provisions." (*U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 72.)

In *Platt* v. *Union Pacific Railroad* (99 U. S., 64), it was said:

"But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the circumstances."

In *Siemons* v. *Sellers* (123 U. S., 276, 285), the court said: "No doubt, the words of the law are generally to have a controlling effect upon its construction; but the interpretation of these words is often to be sought from the surrounding circumstances and preceding history." (Page 58 of Senate Document No. 981.)

The circumstances under which this Act was passed further enforce the construction of its scope and intent for which we contend. There had been an earnest, previous effort in Congress to prohibit all alcoholic beverages. This effort had resulted in legislation prohibiting the manufac-

ture of distilled alcoholic beverages but leaving in the hands of the President the power to limit or prohibit, at his discretion, the manufacture of beer and wine. The legislation in controversy here was the fruit of public and congressional dissatisfaction that the President had not acted to the limit of the powers conferred upon him with respect to beer and wine. It was a re-exercise by Congress of its prerogatives in the case for the purpose of answering an insistent public demand that the manufacture of food material into beer and wine be also prohibited. There was presented to Congress, while the Act was pending, evidence of the increased efficiency in the shipyards located in States which prohibited all liquor. The Secretary of the Navy testified that navy yard workmen in whose vicinity liquor was sold produced less and were less efficient. Manufacturers and others presented evidence that liquor decreased the mental activities and accuracy of workers, lowered their physical strength and efficiency and destroyed the morale essential to the nation's industrial forces. Both beer and wine as well as all distilled liquors had already been prohibited in army camps and in zones about them. The far-reaching benefits of this policy every Congressman knew. The very crux of the legislative struggle which produced this law was over the prohibition of beer. The President prohibited the manufacture of beer with more than 2¾ per cent alcohol in it in his order December 21, 1917. See Exhibit F, page 39, of the Bill of Complaint. The war prohibition was enacted in November, 1918. Why should Congress prohibit what was already prohibited? Clearly it intended to prohibit that which was not included by the President. Intelligent action on the part of Congress can not be explained in any other way.

THE EVIL TO BE REMEDIED.

Another well-settled rule of construction is what was the evil to be remedied?

In the case of the *Holy Trinity* v. *United States* (143 U. S., 457–463), Mr. Justice Brewer in delivering the opinion said: "Again another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. * * * It appears also from the petitions, and in the testimony presented before the committee of Congress." (Page 58 of the Senate Document No. 981.)

The evil to be remedied was clear. Food products were being wasted in the making of beer. Man-power was being crippled by failure to speed up food production and war material. The Army was not getting full support because liquor was wasting our resources at home. The fuel supply was short and the coal producers appealed to the Government to close the liquor saloons. The public hearings on this act known as Hearings before the Committee on Agriculture and Forestry, House Resolutions 11945, are absolutely convincing in showing what was the evil to be remedied and what was the manifest purpose of the act and the construction to be placed upon it. The Chairman of the Committee said to Secretary Daniels as he appeared to testify: "We will be very glad to have your views and your experience or observation as relating to government shipyards where beer, etc., is sold and where they are not sold." See page 235, Hearings on Agriculture and Forestry. 65 Cong., 2nd Session, H. R. 11945, Secretary Daniels said:

"Now you take the question, as I say, at Mare Island. Perhaps there was no town in America where there were so many saloons in proportion to the population or where the conditions have been more wretched. The brewing interests there seemed to dominate the city government. To our appeals for some measure of cleaning up they turned a deaf ear and conditions were so deplorable that it was a crime to let them continue." * * * "My observation on that would probably be drawn from the coal fields of West Virginia, Kentucky, and other sections, where there is a larger foreign population than anywhere else. When prohibition was put into effect in West Virginia and other coal fields, the prediction was freely made that it would result in inefficiency and the foreign-born people would so protest against the taking away of what they called their liberties the mines would lose in production. But if you would submit the question to the people in that country now, it would be carried by a so much larger majroity than before that there would be no question about it. My experience in navy yards and in private yards building ships for the Navy proves this observation. * * * That is the experience everywhere. Many good men think at first it is going to make a great deal of trouble when it comes, particularly in war times, and the men say 'If I do not like it, it promotes the good of the country in carrying on the war,' opinion crystalizes in favor of temperance legislation. In my judgment we ought not during the war to use a bushel of wheat for anything except a prime necessity, whether it is drink or eating; we ought not to use a car in America for anything except to win the war. And every man employed in the industry of producing alcoholic drinks is employed in a business that is not necessary to put it at the very best. In my judgment it is the business that lessens efficiency."

The Secretary of the Navy in his testimony referred to all kinds of liquors regardless of the per cent of alcohol in them.

His testimony was very convincing and was a satisfactory answer to those who appeared before the committee asking that beer and wine be permitted to be manufactured and sold. It was pointed out on page 299 of the Committee Hearing, that there are 65,000 handling and selling it. This was a waste of energy needed in useful industry. It was pointed out on page 300 that the use of alcoholic liquors increased poverty, crime, vice and that there are 600,000 men rejected from the first draft for physical defects and that large numbers of these were caused by the use of drink. General Pershing's testimony was presented on page 189 in the following terms:

"From the military point of view we cannot tolerate alcohol among our soldiers."

The testimony of ship-builders and managers of the shipyards was presented showing that war activities were carried on more successfully where all kinds of liquor was prohibited. There was not the slightest intimation on the part of any individual on either side of the controversy that beer could be sold and manufactured containing 3.3 per cent alcohol by volume or any malt beer under the provisions of this Act. Its purpose was clear. The wording and language of the Act is definite. No one called into question the language of it at the time of its enactment. Opposing counsel cannot show a single line in the debates or at the hearing that sustains the contention which they make. If they wanted to sell beer under the war prohibition act, they should have frankly asked for and secured such an amendment, in fact such an amendment was offered in the House on the original War Prohibition Act and was defeated. It was offered in the Senate and was defeated. This construction for which

opposing counsel contend has been before Congress repeatedly in amendments and has always been defeated. Nothing can be clearer than that the manifest purpose of Congress was that all beer and wine comes within the provisions of the prohibition.

CONCLUSION.

We respectfully submit that the wording of the Act justifies the construction for which we contend, that it is not necessary to prove that the beer in question is actually intoxicating to come within the provisions of the War Prohibition Act, and that the judgment of the court below should be reversed.

Respectfully submitted.

WAYNE B. WHEELER,
ANDREW WILSON,
Attorneys, Amicus Curiae.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
STANDARD BREWERY, INCORPORATED. | No. 458.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

This case arises under and involves the constitutionality and the construction of what is known as the war prohibition act of November 21, 1918, 40 Stat., c. 212, pp. 1045, 1046–7.

THE STATUTE.

The statute provides:

> That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and

during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.

THE INDICTMENT.

Upon this act going into effect, controversy at once arose as to what malt or vinous liquors were prohibited. The Government's contention was that beer was prohibited without regard to its alcoholic content or its actual intoxicating qualities, but, insisting that beer, through a long series of congressional enactments and rulings of the revenue department acquiesced in by the manufacturers, had come to mean a malt liquor produced by the processes by which beer is produced and containing as much as one-half of 1 per cent of alcohol, conceded that such

a liquor containing less than one-half of 1 per cent of alcohol was not beer within the meaning of the prohibition. On the other hand, the brewers insisted that no malt or vinous liquor, whether called beer or what not, was prohibited unless it was, in fact, intoxicating, and that the question of its intoxicating quality was to be determined, as a matter of fact, in each case upon the evidence to be submitted.

The indictment in this case was prepared in view of this controversy and for the purpose of having it determined, and therefore alleged that on the 4th day of June, 1919, at Baltimore, in the State of Maryland, the defendant in error—

> did unlawfully use certain grains, cereals, fruit, and other food products, to wit, 195 bushels of malt and 160 pounds of hops and 2,000 pounds of grits in the manufacture and production of a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said beer so manufactured and produced as aforesaid then and there contained as much as one-half of 1 per cent of alcohol by both weight and volume, contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States. (Rec., pp. 1–2.)

THE DEMURRER.

A demurrer was filed challenging both the constitutionality of the statute and the construction which the Government put upon it.

RULING OF THE COURT BELOW.

The district judge had no difficulty with the constitutional questions raised. Indeed, these questions were not pressed in argument before him, and he treated the act as a constitutional act which was before him for construction.

In construing the act he indicated that his own opinion was in accord with the contention of the Government and that he would have overruled the demurrer but for the fact that he felt, under the circumstances, that he should follow what he understood to be the rulings which had been made by United States judges in New York. He said:

> I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I can not now say

that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the second circuit have each expressed the opinion that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges but because they are unusually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall therefore sustain the demurrer. (Rec., pp. 5–6.)

RULINGS BY OTHER COURTS.

At the time the case was decided the only courts which had passed upon this act in any way were the District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit, in the case of *The Jacob Hoffman Brewing Company* v. *McElligott, Collector, et al.* The rulings made in this case were the ones referred to in the opinion of the district judge quoted above. That case was a suit in equity against the collector of internal revenue and the United States district attorney to enjoin the

former from refusing to sell revenue stamps required for the manufacture of beer and to enjoin the latter from instituting criminal proceedings on account of the manufacture of beer containing not more than 2¾ per cent of alcohol, which the bill alleged was not, in fact, intoxicating. The relief sought was predicated upon the double contention that the act was unconstitutional, or, if constitutional, did not prohibit the manufacture of beer which was not, in fact, intoxicating. The case was heard on a motion to dismiss by District Judge Augustus N. Hand, who held that the act was constitutional, but overruled the motion on the ground that the district attorney was misconstruing the act, which, he held, did not prohibit the manufacture of beer unless it was intoxicating. (259 Fed. Rep. 321.) The application for an injunction was then heard before District Judge Mayer, of the same court, who, treating the ruling of Judge Hand as settling the law for that court, granted the injunction. An appeal was taken from the order granting the injunction to the Circuit Court of Appeals. That court agreed with the District Court that the act was constitutional, but reversed the decree granting the injunction, upon the ground that the act being constitutional the court was without jurisdiction to enjoin criminal prosecutions even if those prosecutions were based upon an erroneous construction of the law. It will be seen, therefore, that the question of the true meaning of the statute was in no way involved in the judgment rendered by the court. Each of the three

judges, however, rendered an opinion and each incidentally indicated that he agreed with the construction placed upon the act by the district judge. (259 Fed. Rep. 525.) These are the opinions of the five judges which the trial judge in the present case felt he should follow and which he permitted to overrule his own views.

Since this case was decided in the District Court the same question has arisen in various other jurisdictions, and there has been a great variety in the rulings made. In the case of *United States* v. *The Pittsburgh Brewing Company et al.*, Judge Thomson, in the District Court at Pittsburgh, sustained the contention of the Government in a carefully prepared but unreported opinion, which is printed in the appendix to the Government's brief in cause No. 603, recently heard by this court. Judge Dickinson, in the District Court at Philadelphia, while ruling that the question was one which should not be decided on demurrer, concluded his opinion with this statement:

> We find ourselves in accord with the ruling of Judge Thomson of the Western District of Pennsylvania. The only difference is that he has seen fit to overrule the demurrer now, and we do not see any occasion to make any formal ruling at this time. All that is really involved is a regulation of the burden of proof, and this, as we have said, is properly a trial ruling.

In the case of *United States* v. *Schmauder*, 258 Fed. Rep. 251, District Judge Chatfield, of Brooklyn, N. Y., holding the District Court in Connecticut, likewise

sustained the Government's contention, in an exhaustive opinion.

In *United States* v. *Stenson Brewing Company*, Circuit Judge Page, holding the District Court in Chicago, Ill., reviewed with great care the decisions of the various district courts and the authorities bearing on the question and reached the conclusion that the Government's construction of the act was correct. His opinion is also printed in the appendix to the Government's brief in cause No. 603 in this court.

On the other hand, the District Court in Louisiana, in a case which is now No. 474 on the docket of this court, the District Courts at Boston, Los Angeles, in Rhode Island, and perhaps one or two other jurisdictions, have sustained the construction placed on the act by the brewers.

ARGUMENT.

The constitutional questions involved have been argued in Cause No. 589, *Elwood Hamilton, Collector*, v. *Kentucky Distilleries & Warehouse Company*, heard at the present term of the court and now under consideration. The Government's views have been fully presented in the brief filed in that case, and it is not deemed necessary now to repeat them.

The act of November 21, 1918, prohibited the manufacture of any beverage included in the commonly accepted meaning of the word "beer" without regard to its alcoholic content or the extent of its intoxicating qualities.

It must be remembered that this act was not passed under the ordinary governmental police powers, but under the special war powers of Congress. It is not

per se a measure for the general promotion of temperance; but its primary purpose was the withdrawal of manpower and foodstuffs from nonessential employment and their devotion to employment necessary for the successful conduct of the war. For this purpose, and under this power, Congress could prohibit the manufacture of nonintoxicating as well as intoxicating beverages. What was done was to place a ban upon certain beverages, whose well-known large production and consumption constituted a heavy drain upon both the labor and food resources of the country. Doubtless, for this reason, and also because they were regarded as injurious to manpower, needed both at home and at the front, the manifest purpose was to class generally as nonessential alcoholic beverages. Accordingly, the act prohibits by name the best-known and most largely consumed beverages of this class, distilled spirits, beer, and wine, beverages which are generally recognized as more or less intoxicating. And to embrace other similar but less well-known beverages there were added the general words "or other intoxicating malt or vinous liquors." It is now insisted, contrary to the Government's contention, that the word "intoxicating" relates back and modifies beer and wine as well as other unnamed liquors, so that only malt or vinous liquors which are, in fact, intoxicating are prohibited. Hence, the contention is that to bring beer within the prohibition the Government must allege and prove that it is intoxicating.

151237—19——2

Act to be construed so as to give effect to every part.

An act of Congress must, if possible, be so construed as to give effect to every part. If it had been the intention of Congress to leave the jury, in each case, to determine whether a particular malt or vinous liquor is intoxicating, and to prohibit only such as may be found, in this way, to be intoxicating, the use of the words "beer" and "wine" was idle. The object would have been accomplished by simply prohibiting "all intoxicating malt and vinous liquors." The only way to give any effect to these words is to say that whatever beverages come within the commonly understood meaning of beer and wine are prohibited, and the prohibition is then extended, by general words, to other beverages which are similar to beer and wine with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities.

Reasons for not leaving jury to determine intoxicating qualities of particular beverage.

There were cogent reasons why Congress, if it desired the law to be effective, should not have left its prohibition to depend upon how a jury in each case would determine the intoxicating qualities of a particular beverage. The word "intoxicating" can scarcely be said to have a very definite meaning. It is ordinarily defined to mean:

> Producing intoxication or feelings like those of intoxication; exhilarating; exciting, maddening, or stupefying with delight. (Standard Dictionary.)

But men will differ about what is exhilarating or exciting. One man will regard as intoxication what another will regard as too mildly exhilarating to be within that term. One expert, according to his standard of intoxication, will deem a given per cent of alcohol sufficient to render a beverage intoxicating while another will differ wholly from him. It is a well-known fact that what will make one man drunk will have no effect upon another, and a drink which, at one time, may seem not to affect a man, may, at another time, make the same man drunk. A law whose enforcement depended upon the determination by juries of such a question would rest upon a most insecure foundation, and anything like a uniform administration of it would be impossible. Hence, the States in passing prohibition laws have always enumerated by name the best-known alcoholic or intoxicating liquors and added general language to include other similar beverages. Congress, in this act, has followed the same course. Beer usually is admittedly an intoxicating beverage and is so classed in the public mind, whether a particular quantity of it will make a particular man drunk or not. To say that the Government must prove in each case that the beer involved is, in fact, intoxicating would make the efficient enforcement almost if not quite impossible.

Rule of ejusdem generis.

"Beer" without qualification is plainly prohibited unless the word "intoxicating" is made to relate back and modify it. It will be insisted that this

modifying result is accomplished under the rule *ejusdem generis*. But to make this application of that rule is to give it a meaning exactly the opposite of that which it has. The rule is that *general words* which follow an enumeration by words of a particular meaning are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. We have here an enumeration of beer and wine by words of a particular and specific meaning, followed by the general words "or other intoxicating malt or vinous liquors." Under the rule referred to the meaning of these *general words* may take color from the words used in the enumeration which they follow. But there is no rule of construction under which words of a particular and specific meaning used in an enumeration are to be given a different meaning by reason of general language following them and intended to describe other articles or persons. Thus, the words "other intoxicating" may be given a meaning reflected by the preceding words "beer" and "wine" and may be held to mean intoxicating in the general sense, or to the extent that beer and wine are intoxicating or alcoholic. But certainly the word "beer" can not be taken in an unusual or strained sense by reason of any general language describing other liquors intended to be included. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is

prohibited; but it can not be so applied as to exclude any beverage which would ordinarily be included under the word "beer." Clearly the intention was to prohibit all beverages which are commonly known as beer. The courts of the various States have almost uniformly given this construction to similar language. *United States* v. *Cohn*, 2 Ind. Terr. 474, 492, 501; *State* v. *Ely*, 22 So. Dak., 487, 492–493; *La Follette* v. *Murray*, 81 Ohio St., 474; *Fuller* v. *Jackson*, 97 Miss., 237, 253–256; *Extract & Tonic Co.* v. *Lynch*, 100 Miss., 650; *Marks* v. *State* (Ala.), 48 So. Rep. 864, 867; *In re Lockman*, 18 Idaho, 465, 469; *Brown* **v. *State*, 17 Ariz. 314.**

Certain cases have heretofore been cited, and will doubtless be cited again, as supporting the contention that the word "intoxicating" must be taken as modifying the word "beer" in the statute. These cases, however, when examined, do not support the argument.

United States v. *Chase*, 135 U. S. 255, involved an indictment for mailing an obscene, lewd, and lascivious letter. The act prohibited the mailing of "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character." The effort on the part of the Government was to construe the word "writing" as including a letter sealed and deposited in the mails. The court, however, held that only a published writing was contemplated by the statute and not a private letter on the outside of which

there is nothing but the name and address of the person to whom it is written. Various reasons were assigned for this conclusion. The court said:

> In the statute under consideration, the word "writing" is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated. (Pages 258–9.)

It will be seen that the word "writing" was itself used as a general word following words used to enumerate a group or class of articles which were commonly recognized as publications. This general expression "writing" was, therefore, given color from the specific words used in the preceding enumeration. The words "book, pamphlet, picture, paper" were held to imply a publication even without reference to the use of that word in the general language following the enumeration. Another reason for the conclusion was that the court found that another and a separate and distinct clause of the act dealt with letters, and manifestly confined the prohibition of letters to those upon which the objectionable matter appeared on the envelope, thus excluding the idea that it was intended to prohibit the mailing of a sealed letter with nothing but the address on the envelope. That the court did not mean to hold

that the word "publication" could limit or modify the meaning of any definite and well-understood word used in the specific enumeration is perfectly clear from what was said when the statute was amended so as to prohibit the mailing of "every obscene, lewd, or lascivious book, pamphlet, picture, paper, *letter*, writing, print, or other publication of an indecent character." 25 Stat., c. 1039, p. 496. When this amended statute came before the court it was never supposed for a moment that the word "publication" used in the general language modified in any way the word "letter" used in the specific enumeration. *Grimm* v. *United States*, 156 U. S. 604; *Andrews* v. *United States*, 162 U. S. 420.

Another case cited is *Insurance Company* v. *Gridley*, 100 U. S. 614. This case does not involve in any sense the rule in question. An insurance company defended against a suit on a life policy on the ground that the applicant had made a false answer in his application. The question which he answered was:

> Have the person's (whose life is to be assured) parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?

The answer was:

> No; except one brother temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hered-

> itary taint of any kind in family on either side of house, to my knowledge.

It was claimed by the company that one of the applicant's uncles had, in fact, been insane for more than a year before his death, but there was no proof as to whether the insanity was hereditary or produced by other causes. After calling attention to the wording of the answer, which was claimed to be false, namely, "no hereditary taint of any kind in family on either side of house to my knowledge," the court said:

> The affirmation was restricted and narrowed down to what the applicant himself personally knew touching the subject. It has this extent; no more.
>
> The company might have refused to insure unless the qualification were withdrawn. Having failed to do this, such is the contract of the parties.
>
> To make out the defense sought to be established by the insurers, three things were, therefore, necessary to be shown; that the alleged insanity of the uncle had existed; that it was hereditary; and that both these things were known to the applicant when he answered the question.

It will be seen that the construction of the language used in the question submitted, which alone could have been governed by the rule in question, was not involved for the reason that the defendant did not make a categorical answer thereto, but made an answer in his own language, which limited his statement to a denial of any hereditary taint. The court

merely held that the policy having been issued upon this statement the company could not successfully defend without showing that the statement as made was false without regard to the form of the question submitted.

Words to be given their ordinary meaning.

Words used in a statute must be given their usual and ordinary meaning unless a contrary intention is expressed. No such intention having been expressed, the question is, What is the usual and ordinary meaning of the word "beer"? All the dictionaries define it as an *alcoholic* beverage obtained by the fermentation of malt or certain other substances. Century Dictionary; Murray's New English Dictionary; Webster; Standard; Bouvier. But the word "intoxicating" appears in no definition. In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage. If it contains the usual ingredients of beer, including alcohol, a beverage is *beer* even though the quantity of alcohol is not sufficient to produce actual drunkenness. Nothing else appearing, it could be well said that such a beverage is beer if it contains any alcohol. But, when used by Congress, it has come to have a slightly different meaning. For years, a tax has been levied on "beer, lager beer, ale, porter, and other similar fermented liquors." Revised Statutes, sections 3335–3339. From the first the internal revenue department has ruled that the tax applied to all such beverages containing as much as one-half of 1 per cent of alcohol. Treasury Decisions 1307, 1360, 2354, 2370, and 2410.

Manufacturers acquiesced and paid the tax. Such a beverage containing as much as one-half of 1 per cent of alcohol has, therefore, long ago come to be recognized both by the Government and the manufacturers as beer. And Congress has continued from time to time in revenue laws to use the same language and may well be said to have adopted the meaning placed upon it by the Government with the acquiescence of the manufacturers. Finally, in the revenue act of 1917, passed before the act now in question, and the revenue act of 1918, passed later, Congress has expressly described beer as containing one-half of 1 per cent or more of alcohol and classed similar beverages containing less as soft drinks. It is clear, then, that when Congress used the word "beer" in the act of November 21, 1918, it used it in that sense.

CONCLUSION.

It is respectfully submitted that the allegation in the indictment that beer containing as much as one-half of 1 per cent manufactured at the time mentioned charges an offense under the statute and that no allegation as to the intoxicating qualities of the beer was necessary and that the judgment of the court below should be reversed.

Respectfully,

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
FILED
DEC 4 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 458.

UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

against

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

WILLIAM L. MARBURY,
RANDOLPH BARTON, JR.,
WILLIAM L. RAWLS,
Counsel for Defendant in Error.

INDEX.

	Page
Table of Cases	ii
Preliminary Statement	1
Indictment	1
The True Construction of the Act of November 21st, 1918	6
Decisions of Federal Courts Upon the Act	14
The Government's Contention Examined	18
Insufficiency of Indictment	26
Constitutionality of Act	28
Conclusion	32
Act of November 21st, 1918—Appendix A	1
Proclamations of President January 30th, 1919, and March 4th, 1919—Appendix B	3 & 5

	Page
Andrews v. United States, 162 U. S. 420	15
Brown v. State, 17 Ariz. 314	17
City of Bowling Green v. McMullen, 122 S. W. 823	17
Evans v. United States, 153 U. S. 584	27
Ex parte Bain, 121 U. S. 1	6
Ex parte Mulligan, 4 Wall. 1	31
Extract & Tonic Co. v. Lynch, 100 Miss. 650	17
Fuller v. Jackson, 97 Miss. 237	17
Gridley v. Northwestern Ins. Co., 14 Blatchf. 107; 100 U. S. 614	17
Grimm v. United States, 156 U. S. 604	15
Jacob Hoffman Brewing Co. v. McElligott et al., 259 Fed. 321, 525	7
In re. Lockman, 18 Idaho 465	17
La Follette v. Murray, 81 Ohio St. 474	17
Marks vs. State (Ala.), 48 So. Rep. 864	17
Moore v. United States, 160 U. S. 274	28
Naftzger v. United States, 200 Fed. 494	6
People v. Strickler, 142 Pac. 1121 (Cal.)	17
Potts v. United States, 114 Fed. 52	16
Sinclair v. Phoenix, etc. Ins. Co., 22 Fed. Cas. 195	17
State v. Ely, 22 So. Dak. 487	17
State v. Virgo, 14 N. Dak. 293	17
United States v. American Brewing Co. (unreported)	7
United States v. Bathgate, 246 U. S. 220	7
United States v. Baumgartner, 259 Fed. 722	8
United States v. Bergner, etc. Brewing Co. (unreported)	8
United States v. Blatz Brewing Co. (unreported)	8
United States v. Carll, 105 U. S. 611	28

Page

United States v. Chase, 135 U. S. 255 14
United States v. Cohn, 2 Ind. Terr. 474 17
United States v. D. & H. Co., 213 U. S. 266 32
United States v. Henley Brewing Co. (unreported) 8
United States v. Hess, 124 U. S. 483 28
United States v. Jin Fuey Moy, 241 U. S. 394 32
United States v. Loftis, 12 Fed. 671 15
United States v. Mohr (unreported) 8
United States v. Petts (unreported) 8
United States v. Pittsburg Brewing Co. (unreported) 8
United States v. Porto Rico Brewing Co. (unreported) 8
United States v. Ranier Brewing Co., 259 Fed. 359 7
United States v. Schmauder, 258 Fed. 251 8
United States v. Simmons, 96 U. S. 360 28
United States v. Stenson Brewing Co. (unreported) 8
United States v. United Verde Copper Co., 196 U. S. 207 16

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 458.

UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

against

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The question presented for decision in this case is whether the action of the United States District Court for the District of Maryland, in sustaining the demurrer to an indictment against the defendant in error was correct.

The indictment alleges (Record, pages 1 and 2) that the defendant,

> "Heretofore, to wit, on the 4th day of June, in the year of our Lord, 1919, at Baltimore, in the State of Maryland and District aforesaid, did unlawfully use certain grains, cereal, fruit and other food products, to wit, 195 bushels of malt, 160 pounds of hops and 2,000 pounds of grits, in the manufacture and production of a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said

beer so manufactured and produced as aforesaid, then and there contained as much as one-half of one per cent. of alcohol, by both weight and volume; contrary to the form of the statute in such case made and provided, and against the peace, government and dignity of the United States."

At the foot of the indictment is a note referring to the Act of November 21, 1918, Section 4.

The indictment was found on June 11, 1919.

The question presented by this demurrer is whether the allegations of the indictment as above set forth are sufficient to charge an offence against the laws of the United States. The defendant states in several different forms in its demurrer as causes for demurrer that the indictment does not allege facts constituting an offence under any of the laws of the United States and particularly that it does not state facts sufficient to charge an offence under the Act of Congress of November 21, 1918, section 4, referred to upon the indictment. The demurrer further states as a cause for demurrer that the Congress of the United States was without power under the Federal Constitution to enact section 4 of the Act of November 21, 1918, and that the same is therefore invalid and void in so far as it may be considered to forbid the use at the time mentioned in the indictment of food products in the manufacture of beer for beverage purposes. These two main questions thus arising upon the demurrer will be discussed in this brief in the order stated.

There is printed as Appendix A to this brief a copy of that part of section 4 of the above Act which is pertinent to this discussion, with the particular clauses thereof with which the Court is directly concerned italicized. There is no other Act of Congress under which, by any possibility, it could be claimed that an offence such as that stated in the indictment is created.

The Act of October 28th, 1919, commonly known as the Volstead Act, enacted to enforce the Act of November 21, 1918, can of course not operate so as to make anything a crime which was done prior to the passage of that Act. If it were lawful to manufacture non-intoxicating beer on the 4th day of June, 1919, the date upon which the offence in this case is alleged to have been committed, it is, of course, too clear for argument that any subsequent amendment of the law purporting to make the act here charged against the defendant an offence as of the date of its occurrence, would be an *ex post facto* law and plainly unconstitutional. But the Volstead Act does not purport to have any such retroactive effect. In so far as it changes the definition of intoxicating liquors for the purposes of the Act of November 21, 1918, the Volstead Act, by its own terms, is only "*hereafter*" operative.

The Act of Congress of August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging the production, conservation of supply and controlling the distribution of food products and fuel," creates no offence such as that alleged in the indictment. It may, for the purpose of clearness, be well to state that the President of the United States was authorized by section 15 of the last-mentioned Act, when he found "that limitation, regulation or prohibition of the use of foods, fruits, food materials or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor is essential in order to insure the adequate and continuous supply of food that the national security and defense will be subserved thereby," etc., to prescribe and give public notice of the extent of the limitation, regulation, prohibition or reduction so necessitated. It further provided that whenever such notice was given and remained unrevoked, no person should after a reasonable time prescribed in such notice,

use any of the materials mentioned in the President's proclamation in the production of malt or vinous liquors, except under license issued by the President, and in compliance with rules and regulations determined by him, authorizing the production and importation of such liquors and the alcoholic content thereof. Penalties were then prescribed for violations of the said Act, and of any rule or regulation made by the President in pursuance thereof.

The President, under the authority so conferred upon him by this Act of August 10, 1917, has from time to time issued proclamations setting forth certain limitations upon the use of the materials therein mentioned in the manufacture of malt or vinous liquors, and fixing the alcoholic content thereof. It is not necessary to set out in detail the terms of these several proclamations. It is sufficient for the purposes of this case to say that on January 30, 1919, the President issued a proclamation modifying an earlier proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, and later, on March 4th, issued another proclamation further modifying that of September 16, 1918, wherein he stated that:

> "And, whereas, for the production from a cereal base of non-intoxicating beverages which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, and for which the use for such beverages is prohibited by the aforesaid proclamation of September 16, 1918, are required;" etc.

The President in this proclamation (March 4, 1919), then proceeds to modify the proclamation of September 16, 1918, so as to permit the use of sugar and glucose, corn, rice and any other foods, fruits, food materials, hops and malt in the manufacture of non-intoxicating malt liquors for beverage purposes. The proclamations

of the President of January 30, 1919, and March 4, 1919, above referred to, are printed as Appendix B to this brief.

It thus appearing that the President, under the authority vested in him by Congress, has authorized the use of the materials and food products mentioned in the Act of August 10, 1917, in the manufacture of non-intoxicating malt beverages, it follows, that unless the indictment in this case contains an allegation to the effect that the beverage produced by the defendant on June 4th was in fact intoxicating, no offence is alleged under that Act. There being obviously no such allegation nor any allegation equivalent thereto, no further reference need be made to the Act of August 10, 1917.

Upon examining the indictment it will be found that it simply alleges that the defendant used on June 4th the materials named in the manufacture and production of

> "a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said beer manufactured and produced as aforesaid then and there contained as much as one-half of one per cent. of alcohol by both weight and volume."

The indictment evinces a clear intention upon the part of the Government to refrain from alleging that the product mentioned is intoxicating. It further shows an intention upon its part not to allege that the product manufactured by the defendant was beer as ordinarily understood, but a specific and peculiar kind of beverage described as *beer containing as much as one-half of one per cent. of alcohol.* The inference is clear that the Government did not feel justified in describing the product produced by the defendant simply as beer, but desired to describe a different thing from what is ordinarily and usually understood to be beer, and therefore coupled with the word "beer" a statement as to its specific alcoholic content. The alcoholic content thus stated is an essen-

tial and primary part of the description of the thing alleged to have been manufactured and produced by the defendant, and is equally as much a means of identification of the product mentioned in the indictment as the word "beer" itself. *Ex parte Bain,* 121 U. S. 1, 4-13; *Naftzger vs. United States,* 200 Fed. 494.

THE TRUE CONSTRUCTION OF THE ACT OF NOVEMBER 21, 1918.

Under the allegations of the indictment, therefore, unless it can be shown that section 4 of the Act of November 21, 1918, prohibits the use of the materials named therein in the manufacture of a beverage described as beer containing as much as one-half of one per cent. of alcohol by both weight and volume, no offence is alleged under that Act. The defendant submits that the Act of November 21, 1918, does no such thing.

The proper construction of that Act prohibiting after May 1, 1919, the use of food products in the manufacture, and after July 1st the sale of

> "beer, wine or other intoxicating malt or vinous liquor for beverage purposes"

requires that the descriptive term "or other intoxicating malt or vinous liquor" should be deemed to relate back and define the immediately preceding words "beer" and "wine," for otherwise the word "other" would have no meaning or use whatever. In other words, that the liquors referred to in the clause quoted are by reason of the language used intended to be described as one class having the common characteristic of being intoxicating. Any other interpretation would render the word "other" wholly meaningless and useless in the clause and would so entirely change the ordinary, natural import of the language employed as to amount to a rewriting of a law by the Court.

When after mentioning beer and wine the clause proceeds, "or other intoxicating malt or vinous liquors, etc.," the conclusion is irresistible that the beer and wine intended to be referred to are intoxicating beer and wine.

It should always be remembered that this is a case of a prosecution under a highly penal statute, a statute in derogation of common right. It is therefore subject to the just and reasonable rule of construction applicable to such statutes. This has been many times stated and followed by this Court, and in the recent case of *United States v. Bathgate*, 246 U. S. 220, 225, was thus reiterated:

> "There can be no constructive offences, and before a man can be punished his case must be *plainly and unmistakably within the statute.*"

The construction upon which the Government seeks to sustain the indictment, we submit, is not only not a plain and unmistakable one, but on the contrary is opposed to the language which Congress has deliberately employed, and to the intention and purpose of Congress as evidenced by all the provisions of the Act.

The contention here made by the defendant in error is the one announced by Judge HAND in the District Court for the Southern District fo New York (259 Fed. 321), and unanimously affirmed by the Judges of the Circuit Court of Appeals of the Second Circuit in the case of *Jacob Hoffman Brewing Co. v. McElligott et al.*, 259 Fed. 525.

And in the following cases the same construction of this statute was adopted:

United States v. American Brewing Co. (U. S. Dist. Ct., E. Dist. of Louisiana). Unreported.

United States v. Ranier Brewing Co. (U. S. Dist. Ct., N. Dist. of California), 259 Fed. 359.

United States v. Baumgartner (U. S. Dist. Ct., S. Dist. of California), 259 Fed. 722.

United States v. Petts (U. S. Dist. Ct. of Massachuetts).

United States v. Henley Brewing Co. (U. S. Dist. Ct. of Rhode Island). Unreported.

United States v. Mohr (U. S. Dist. Ct., W. Dist. of Wisconsin). Unreported.

United States v. Porto Rico Brewing Co. (U. S. Dist. Ct. of Porto Rico). Unreported.

United States v. Blatz Brewing Co. (U. S. Dist. Ct., E. Dist. of Wisconsin).

In the following cases the Government's contention was upheld:

United States v. Pittsburgh Brewing Co. (U. S. Dist. Ct., W. Dist. of Pennsylvania). Unreported.

United States v. Schmauder (U. S. Dist. Ct. of Connecticut), 258 Fed. 251.

United States v. Stenson Brewing Co. (U. S. Dist. Ct., N. Dist. of Illinois). Unreported.

In the case of *United States v. Bergner, etc., Brewing Co.* (U. S. Dist. Ct., E. Dist. of Pa., unreported), the Court refused to pass upon the question of construction when raised by a demurrer.

The language employed by Congress manifests a clear intention upon its part to deal in this statute with intoxicating liquors alone. To have prohibited anything other than intoxicating liquors, as contrasted with non-intoxicating liquors, would have been beyond the object which Congress had in view. Such a prohibition would have had no relation to that object. The Act does not leave to inference the reason which led Congress to enact it. It expressly declares that it is passed

"For the purpose of conserving the man power of the Nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy," etc.

Anything, therefore, which could not injuriously affect or in any way impair the man power of the Nation or decrease efficiency in the production of the supplies for the army and navy, and the instrumentalities of war, enumerated in the Act, cannot reasonably be said to be within the scope of the prohibition therein contained. In order to impute to Congress the intention to include within the prohibition of this legislation the manufacture of a product which is perfectly harmless and which may be lawfully manufactured even in states having general prohibition legislation, the language of the Act, which it is asserted shows such an intention, ought to be clear and unmistakable.

To adopt any construction other than the one which would require all malt liquors to be intoxicating in order to be within the prohibition of the statute would lead to an extraordinary inconsistency in its provisions. Although the Government has contended that beer is prohibited irrespective of its intoxicating character, it has never contended heretofore that any other malt liquor is so prohibited, for it recognizes that all other malt beverages, and there are a number of them, must be "intoxicating malt * * * liquor" in order to be brought within the condemnation of the statute. But no reason has ever been suggested why Congress should prohibit non-intoxicating beer and not prohibit non-intoxicating ale and porter. It cannot be said that ale and porter are the same thing as beer, because the revenue acts since 1866 have treated beer as contradistinguished from ale and porter. The Act of July 13 of that year thus described malt liquors subject to taxation: "Beer, lager beer, ale, porter or other similar fermented liquor by whatever

name such liquor may be called." See also Revenue Act of October 3, 1917, 40 Stat. 311, Sec. 307; Revenue Act February 24, 1919, 40 Stat. 1109.

So that no object could possibly have been within the contemplation of Congress in prohibiting the manufacture and sale of non-intoxicating beer which would not have been entirely defeated by the right to manufacture all other non-intoxicating malt liquors which Congress deliberately left undisturbed.

Any force in the suggestion, therefore, that beer, whether intoxicating or not, was intended to be prohibited as a means of making effective the prohibition upon intoxicating liquors by removing the temptation or opportunity to produce and sell actually intoxicating liquors under the guise of harmless beverages, vanishes when it is seen that the statute permits under its plain language the manufacture of other non-intoxicating malt liquors which would afford exactly the same opportunity for violations of the law as the manufacture and sale of non-intoxicating beer.

There being thus no reason for any differentiation between non-intoxicating beer and any other non-intoxicating malt liquor, it is not to be supposed that Congress intended to favor those who produced and sold the one, over those who produced and sold the other. It is only by a strained, unnatural and, as we submit, inadmissible construction of the language of this Act that such a result can follow. By giving to the word "other" its usual signification and effect, the descriptive term "intoxicating" relates back and qualifies the word "beer," and thus only prohibits its manufacture when it has the character of the other malt liquors the manufacture and sale of which are prohibited—namely, that of being intoxicating.

That it was the purpose of Congress to prohibit by the Act of November 21, 1918, the manufacture and sale of intoxicating liquors only is plainly evidenced by the subsequent provisions of the same section of the Act dealing with the importation of liquors, and their manufacture, sale and distribution in zones which the President is empowered to establish about coal mines, munition factories, shipbuilding plants, etc.

With respect to importation it is provided: "After the approval of this Act *no distilled, malt, vinous or other intoxicating liquors* shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, that this provision against importation shall not apply to shipments *en route* to the United States at the time of the passage of this Act."

It of course cannot be contended that in this clause of the Act the word intoxicating does not relate back and qualify the antecedently enumerated liquors. Non-intoxicating malt liquors may therefore, so far as this Act is concerned, *be imported* into the United States.

The Government's contention with respect to the provisions prohibiting the manufacture and sale *in the United States* of "beer, wine and other intoxicating malt and vinous liquors for beverage purposes" leads therefore to this strange result: That although a citizen of the United States cannot buy a non-intoxicating beer from a domestic manufacturer or dealer, he may import it into the United States.

The fact that the provision as to importation was, under the terms of the Act, to go into effect from the date of its pasage, while the provision with respect to manufacture and sale in the United States did not become operative until later, affords no ground for saying that the scope of one provision was intended to be broader or

narrower than that of the other. There is no conceivable reason why Congress could not have dealt immediately with the importation of liquors in the same way as it intended ultimately to deal with them from the standpoint of domestic manufacture and sale. Upon the contrary, the considerations of policy which would weigh with Congress in postponing the operation of the provisions with respect to manufacture and sale of liquors in the United States would have no weight at all with respect to the provision having to do with their importation. It would impute to Congress a most remarkable confusion of purpose to say that although non-intoxicating malt liquors could be imported at any time, under the provisions of the Act, yet they could not be manufactured and sold in the United States after May 1st and June 30th respectively. All this contradiction and confusion does not follow from anything appearing in the Act itself, but from the construction which the Government seeks, without warrant, as we submit, to place upon the language employed. By giving to the word "other," as used in the clause particularly under consideration its ordinary significance, all incongruity and conflict between the various clauses disappear, and a single harmonious purpose becomes manifest, namely, to prohibit by all its provisions only those liquors which are in fact intoxicating.

And so as to the zones which the President was empowered to establish. This power he was to have from the date of the passage of the Act. It is manifest that if Congress believed that there was any necessity at all for the prohibition upon the manufacture and sale of non-intoxicating liquors that this need would be most urgent in the immediate vicinity of those places where industrial plants whose efficient operation was essential to the successful prosecution of the war were located. The President, however, was only empowered

"to prohibit the sale and manufacture or distribution of *intoxicating liquors* in such zones."

The construction of the Act which the Government advances would compel us to assume, that although Congress was pursuing the purpose of more effectually prosecuting the war, it proceeded upon the anomalous formula that the rigor of its laws should diminish in the exact proportion that a reasonable regard for the end to be attained would require it to increase.

When the clause of the Act of November 21st, 1918, upon which this indictment purports to be founded, is examined, it will be found that Congress could not have intended to deal with anything thereunder, except intoxicating liquors. For the purpose of convenience, the clause is here repeated:

> "After May 1st, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grain, cereal or other food product shall be used in the manufacture or production of *beer, wine or other intoxicating malt or vinous liquors, for beverage purposes.*"

The term "other intoxicating," following the words beer and wine, clearly shows that only intoxicating beer and wine were intended to be prohibited. It is only by giving the clause this meaning that the word "other" can be given any significance. But the clause proceeds to say: "other intoxicating malt or vinous liquor." This shows that *the beer* intended to be prohibited was that which was an intoxicating malt liquor, and that *the wine* was an intoxicating vinous liquor. In other words, that both the qualifying words "intoxicating and malt" are coupled with the word "beer," and that the words "intoxicating and vinous" are coupled with the word "wine." At the end of the clause are the words "for beverage purposes," which, of course, refer back and qualify all the liquors

previously mentioned. Thus it is shown that Congress only intended to deal with malt and vinous liquors, by whatever name they might be called when they met the two conditions specified, viz: when they were intoxicating and when they were manufactured for beverage purposes. The language used is so clear that it is scarcely capable of any elucidation. The interpretation which is here placed upon it is that which the mind naturally gives it, without any effort, and the one which a critical examination of the text of the statute confirms.

It is the interpretation which is required by the rules of construction which this Court and other courts have uniformly applied to similar language. The case of *United States v. Chase*, 135 U. S. 255, involved the same question of statutory interpretation. It arose under the Act of Congress of July 12th, 1876, 19 Stat. 90, which prohibited the use of the mail for "every obscene, lewd, or lascivious book, pamphlet, picture, *paper, writing*, print or other *publication* of an indecent character." The indictment charged the mailing of a *sealed* and addressed *letter* of an indecent character. One of the questions presented was whether the words "*or other publication*" qualified the preceding words "paper" and "writing," so as to prohibit these when they had the quality of "publication," thereby excluding from the statute *sealed, private letters*, which had not been published. It was held by this Court that, under a well-defined rule of construction, the words "other publication" related back and qualified the words preceding them, and, consequently, only published papers and published writings were prohibited by the statute.

This Court said, speaking through Mr. Justice Lamar (pp. 258 & 9):

> "In the statute under consideration, the word 'writing' is used as one of a group or class of words, —book, pamphlet, picture, paper, writing, print,—

each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated.

"It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

In an earlier case, arising under the same statute, *United States v. Loftis*, 12 Fed. 671, Judge Deady applied the same rule of construction, as follows:

"Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a 'publication.' This word 'writing' occurs in an enumeration of things—books, pamphlets, pictures, prints and papers—which *ex vi termini* are prima facie publications.

"The general phrase with which the enumeration ends, 'or other publication of an indecent character,' impliedly asserts that the things before enumerated are publications. The expression 'John and James and other men' is one in which, by a necessary implication, it is asserted that John and James are men."

After the above cases arose, the Act of Congress of July 12th, 1876, was amended by the Act of September 26th, 1888 (25 Stat. 496, c. 1039), by inserting the word "letter" in the list of prohibited publications, and adding the provision "whether sealed as first-class matter or not." It was thereafter held that the Statute, as amended, applied to the mailing of a private sealed letter.

Grimm vs. United States, 156 U. S. 604.
Andrews vs. United States, 162 U. S. 420.

The meaning and effect of the word "other" when similarly used in a statute was again declared by this

Court in *United States v. United Verde Copper Co.*, 196 U. S. 207, where there was presented for interpretation the Act of Congress of June 3rd, 1878 (20 Stat. 88, c. 150), permitting the use of timber on the public lands "for building, agricultural, mining and other domestic purposes." The question presented was whether the phrase "other domestic" qualified the preceding words. This Court, speaking through Mr. Justice McKenna, said (at p. 213):

> "Counsel for the Government recognizes this, and substitutes for 'domestic' the word 'household' and contends that the word 'other' should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for 'building, agricultural, mining or *domestic* purposes.' But we are not permitted to take such liberty with the statute, if 'domestic' has a meaning consistent with the intentional use of the word 'other.' It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a country, state or nation, according to the object in contemplation. So in the statute the word 'domestic' applies to the locality to which the statute is directed, and gives permission to the industries there practised to use the public timber. This definition of 'domestic' gives the word an apt and sensible meaning and we must regard the association of the word 'other' with it as designed, not accidental."

In *Potts vs. United States*, 114 Fed. 52, there was presented the interpretation of the Act of Congress, 23 Stat. 231, providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands. The Circuit Court for the Ninth Circuit said (at p. 54).

"By a well-known rule of construction the words 'or any other unlawful means' in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing,' so that those words must be read as 'unlawful fencing' and 'unlawful inclosing'."

See further:

Gridley v. Northwestern Mutual Life Ins. Co., 14 Blatchf. 107, 108, affirmed 100 U. S. 614.

Sinclair v. Phoenix Mt. L. Ins. Co., 22 Fed. Cas. 195.

In the State Courts, where the word "other" has been used in a similar way in statutes dealing with intoxicating liquors, the decisions have been in accordance with the rule of construction announced by this Court, and other Federal Courts, in the above cases.

In *City of Bowling Green v. McMullen*, 122 S. W. 823, 825, the Court of Appeals of Kentucky declared that a non-intoxicating malt liquor did not come within the meaning of a statute relating to "spirituous, vinous, malt or other intoxicating liquors." In *State v. Virgo*, 14 N. Dak. 293, 295, the same interpretation was placed upon substantially the same language, and see *People v. Strickler*, 142 Pac. 1121, 1123 (Cal.).

Other cases in the State Courts relied upon by the Government, (*United States vs. Cohn*, 2 Ind. Terr. 474; *State v. Ely*, 22 So. Dak. 487; *LaFollette v. Murray*, 81 Ohio St. 474; *Fuller v. Jackson*, 97 Miss. 237; *Extract & Tonic Co. v. Lynch*, 100 Miss. 650; *Marks v. State* (Ala.), 48 So. Rep. 864; *In re Lockman*, 18 Idaho 465; *Brown v. State*, 17 Ariz. 314), are not in conflict with the state decisions above referred to. They were decided upon statutes containing different language from that here involved and the Courts were in several of them guided by a legislative history which pointed to an intention to make the law all-inclusive. These cases have been ela-

borately reviewed in the Supplemental Brief of counsel in No. 603, argued in this Court of November 21st, and will therefore not be again examined.

II.

THE GOVERNMENT'S CONTENTION EXAMINED.

If the construction of the statute which has just been urged is not accepted, what other construction is there that this Court can adopt? The Government has heretofore contended that the effect of the language under consideration is such as to bring not only intoxicating beer and wine within the prohibition of the statute, but all beer and wine regardless of alcoholic content, and regardless of its intoxicating or non-intoxicating character. No one has yet laid down any definition of beer which can be used for the purpose of determining what would be included within the term as thus construed.

The Government in this case admits, certainly in effect, by the form in which the indictment is drawn, that some percentage of alcohol is necessary even to give it a semblance of a ground to argue that a given product is beer. The indictment alleges that the beverage mentioned therein contained as much as one-half of one per cent. of alcohol. Why one-half of one per cent.? If the presence of less than one-half of one per cent. does not render a given beverage subject to classification as beer, by what definition, rule or standard does the presence of as much as one-half of one per cent. bring it within that class of beverages?

That there is a line of demarcation between what is beer, and what is not beer, dependent upon the amount of alcohol present, is, as we have seen, a conceded fact in the case. But certainly this Court will not undertake here upon this demurrer to erect a standard as to the

percentage of alcohol necessary to make a beverage "beer" unless there are facts of which it will take judicial notice which clearly establish that there is a definite, certain and incontrovertible standard which it must follow. It will appear later that instead of there being a test of which the Court must take judicial notice, enabling the Court to hold that one-half of one per cent. of alcohol is enough to make a fermented malt beverage "beer," the fact is just to the contrary.

If the Government relies upon its construction of the Act of November 21, 1918, to the effect that all beer is included within the prohibition thereof, why did it not simply allege that the product charged as having been manufactured by the defendant was "*beer?*" The reason why this was not done, we submit, is clear. Simply because everyone knows that no Court would hold that all kinds of beer, such, for instance, as root beer, ginger beer and many others, were within the prohibition of the statute. If, however, this is answered by saying that only *malt* beer is intended, it follows plainly that such a limitation can only be imposed on the general term "*beer*" by reason of the expression, "or other intoxicating *malt* and vinous liquor," and, of course, if the word *malt* reflects back and limits the general word beer, then by irresistible logic the word "intoxicating" does the same thing.

This is the indisputable effect of the Government's position so far as the language of the Act of Congress is concerned. But suppose the Government ignores the statute and says that this is a law dealing with intoxicating liquor and that the kind of beer dealt with is the same kind that is dealt with in similar statutes upon the same subject. Here, again, so to qualify the all-inclusive signification of the word—that is, the meaning which would embrace root beer, ginger beer, near beer and everything called beer—in this way, leads exactly to the

same result as the reasoning from the statute itself—namely, that "beer" must be not only malt beer, but intoxicating beer. For surely no one would for a moment contend that there can be deduced from the course of legislation in the several states of this country a fixed, unvarying rule, to prohibit the manufacture and sale of all malt beer entirely, regardless of whether it is or is not intoxicating.

There is no ruling by any department of the Government laying down any standard by which a given beverage is to be classed as beer as distinguished from any other fermented liquor. The alcoholic percentage mentioned in the indictment doubtless was suggested by certain rulings of the Internal Revenue Deaprtment upon certain sections of the Revenue Law, but in no instance* has the Department ever undertaken to differentiate between "beer, lager beer, ale, porter and other similar fermented liquors," or between intoxicating and non-intoxicating beverages. No occasion has arisen for any such differentiation.

It was stated by counsel for the Government below that for a long period of years beer had been taxed as beer specifically, the inference sought to be drawn from this statement being that if the word "beer" had been used in a revenue statute, thus rendering it necessary for the departments of the Government to deal with beer specifically, thereby an established definition of the word would result and it would follow that when the same word was used in this Act of November 21, 1918, Congress would be presumed to have intended it to have the meaning thus established. But no basis exists for such an inference. Congress has taxed since 1866 "all beer, lager beer, ale and other similar fermented liquors brewed or manufactured, sold or removed for consump-

*That is prior to the controversy arising under the Act of November 21, 1918.

tion or sale within the United States by whatever name such liquors may be called," etc. 14 Stat. 164, Sec. 48.

It will thus be seen that while beer is one of the enumerated beverages made subject to the tax it is also included within the general expression "fermented liquors." The only question with which the Commissioner of Internal Revenue has had to deal has been whether or not a given liquor was a *fermented* liquor within the meaning of this section. All fermented liquors have been taxed in exactly the same way regardless of their various classifications, that is, they have all been taxed as *fermented liquors.*

A special tax upon brewers has been imposed since the Act of July 13, 1866, being Section 3244 of the Revised Statutes, which section contains the following:

> "1. Brewers shall pay $100. Every person who manufactures fermented liquors of any name or description for sale from malt, wholly or in part, or from any substitute therefor shall be deemed a brewer; provided, any person that manufactures less than 500 barrels a year shall pay the sum of $50.00."

Under the same section of the Revised Statutes there is imposed a tax of $20.00 upon "retail dealers in malt liquors" and a tax upon "wholesale dealers in malt liquors."

The rulings of the Department are to the effect that each of the classifications of "malt liquors" and "fermented liquors" includes the other, that is, each must be both fermented and malt. It is thus obvious that the question as to the difference between the beverages enumerated could never have arisen in the administration of any of these sections of the Revised Statutes because it was sufficient for the purposes of taxation if any particular liquor was a *fermented malt* liquor.

The question *has* arisen as to what is a fermented malt liquor within the meaning of these sections and the Com-

missioner of Internal Revenue has ruled that nothing can come within this general classification unless it has an alcoholic content of as much as one-half of one per cent. by volume. This ruling was based upon the principle that anything containing less than one-half of one per cent. of alcohol was either not fermented or not made from malt or any substitute for malt. The percentage of one-half of one per cent. of alcohol was selected because it was determined by the chemists of the Government that where so insignificant an alcoholic content was present such a liquor could not be said to be within the classification of a fermented malt liquor subject to the tax. This will appear by T. D. 1307, as follows:

"TREASURY DEPARTMENT.

Office of Commissioner of Internal Revenue.

Washington, D. C., Feb. 5, 1908.

Gentlemen:

This office is in receipt of your letter of the 31st ult. relative to the manufacture of soft drinks from malt and hops, and calling attention to previous rulings of this office as to the requirement of tax on a fermented liquor made from malt regardless of the percentage of alcohol contained, and as to the non-requirements of special tax for the sale of beverages containing less than one-half of 1 per cent. of alcohol.

In reply you are advised that after careful consideration I have reached the conclusion that, while Section 3339 R. S. requires the payment of the tax of $1 per barrel on all beer, lager beer, ale, porter and other similar fermented liquors, the practical administration of the law necessitates the fixing of a point below which the alcoholic content is too inconsiderable to class the beverage as either of the liquors enumerated above, or similar thereto, or to bring same within the consideration of the internal revenue laws. The practice and rulings of this office have already fixed this point as one-half of 1 per cent. in

the case of sales of beverages of this character, and I see no sufficient reason for making a distinction between the manufacturer and dealer in this class of beverages. It is, therefore, held that beverages containing not more than one-half of 1 per cent. of alcohol by volume do not come within the consideration of the internal revenue laws either as to manufacture or sale.

Respectfully yours,
JOHN G. CAPERS,
Commissioner.

Mr. —— ————
Lexington, Ky."

But however the different sections of Internal Revenue Law with their comprehensive language, may have been enforced *for the purpose of collecting revenue,* it has nothing whatever to do with the interpretation of the Act of November 21, 1918. It is well known, of course, that the Revenue Laws are interpreted with the utmost liberality by the Internal Revenue officials in favor of the Government, and that everything that it is possible to bring within the reach of those laws is held by them to be included therein. Of course, no one would seriously contend that the standard established by the Government officials themselves for the purposes of determining what is a fermented liquor can be used for the purpose of determining what is an intoxicating liquor or determining what is *beer.* The Commissioner of Internal Revenue has expressly ruled, T. R. 804, "that the question whether a fermented malt liquor is intoxicating is immaterial under the Internal Revenue Laws, although it may be a very important question under the prohibitive laws of a state or under local ordinances."

So that even if the Court should consult the rulings of the Commissioner of Internal Revenue for the purpose of determining what is an intoxicating liquor or what the alcoholic content of any given beverage is, as a matter of fact it would receive no light whatever upon these questions from those rulings.

It has already been pointed out that the Act of Congress of August 10, 1917, gives the President power to regulate the use of food materials in the production of "malt or vinous liquors for beverage purposes," thus showing that Congress knew how to express itself when its object was to forbid the production of malt and vinous liquors regardless of their intoxicating or non-intoxicating character. It is clear that its intention there was to deal generally with all malt and vinous liquors just as the Revenue Law dealt with all fermented malt liquors. If it had been the intention of Congress when it passed the Act of November 21, 1918, to include all malt liquors within the prohibition of that Act it had a precedent before it containing apt language for that purpose, and it can hardly be conceived that if it had been its intention to make the Act of November 21, 1918, as sweeping as the Government contends in this case it did, it would not have employed the same language which it used in the earlier Act.

Of course, it is apparent that in dealing with the question of conservation under the Act of August 10, 1917, the use of food products in the manufacture of non-intoxicating beverages was as much a thing to be prohibited as their use in intoxicating liquors; and accordingly Congress vested in the President authority to prohibit the use of such products in all malt and vinous beverages regardless of whether they were intoxicating or not. But under the Act of November 21, 1918, passed as it expressly declares for the purpose of conserving the man power of the country, the manufacture or sale of non-intoxicating beverages could have no possible connection with such purpose so announced by Congress, and accordingly we find language in the Act which plainly discriminates between intoxicating and non-intoxicating beverages. The same reasoning applies with equal force to the Internal Revenue Laws.

Where Congress was passing a statute for the purpose of raising revenue it used a comprehensive expression because it desired to bring a large number of things within the tax imposed, and if Congress had intended when it enacted the Act of November 21, 1918, to make the prohibition therein contained as broad as the scope of the tax in the Revenue Law, it would have used the same language or language plainly as comprehensive.

The Government insists that if this provision of the Act of November 21, 1918, is held to mean that only actually intoxicating liquors are prohibited thereunder, a question of fact will be presented in each case as it arises, with a consequent variation of opinion among courts and juries upon the question of what liquors are in fact intoxicating. It would be a sufficient answer to this to say that there is no more difficulty under this statute in that respect than there is under any other where it is necessary to prove as an element of the offence, that the thing sold or manufactured is the thing the selling or manufacture of which the law forbids. But there is even a more conclusive answer afforded by what appears in the very Act under consideration. It must be conceded by the Government that under the clause with respect to importation and that conferring power upon the President to establish zones, malt and vinous liquors are only prohibited when they are *intoxicating*. As these provisions would without doubt present exactly the same question of fact in their enforcement which the Government says would arise upon the construction for which we contend with respect to the particular provision under which this indictment is brought, it can hardly be supposed that Congress regarded this suggested difficulty as having any substance at all.

Further than this, however, we have already pointed out that the Government does not contend that any malt liquor other than beer is prohibited irrespective of

whether it is intoxicating or non-intoxicating; in other words, it does not contend, as we understand, that the manufacture of ale, porter, stout or any malt liquor other than beer is forbidden by the statute unless it can be proved to the satisfaction of a court or jury, as the case may be, that it is intoxicating as a matter of fact. This being true, with respect to all these malt beverages, what possible reason can be urged for holding that in this respect beer was placed by Congress upon any different footing.

It is further urged by the Government that as beer is a malt liquor and wine a vinous liquor it would have been unnecessary for Congress to use any words in addition to the expression "intoxicating malt and vinous liquor" if it had intended to include in the prohibition only intoxicating beer and wine. In other words, it urges that the construction for which we contend would render the words "beer" and "wine" unnecessary. But this simply amounts to a criticism of style, for such circuity or tautology of expression is general in legislative draftsmanship. The statutes involved in the cases hereinbefore referred to, declaring the effect of the use of the word "other," are all illustrations of this mode of expression, and they are numerous in Federal as well as in State legislation. The question here is, what does the language employed mean? We are not concerned with the question as to whether Congress could have expressed its meaning by a different form of words.

III.

THE INDICTMENT IS INSUFFICIENT TO CHARGE AN OFFENCE UNDER THE ACT AS PROPERLY CONSTRUED.

The proper construction of the Act of November 21, 1918, having been shown to be that it only prohibits the

manufacture and sale of beer and wine which are in fact intoxicating, the effect of this construction with respect to the legal sufficiency of the allegations of the indictment should be briefly indicated.

It is clear that in order to allege an offence within the purview of the Act, the indictment must show upon its face that the beer manufactured and produced from the material named in the indictment must have been an intoxicating beer. The Act clearly distinguishes between intoxicating and non-intoxicating beer, prohibiting the manufacture only of the former. What might have been the case had the Government charged the manufacture of "beer" simply, there is no occasion to discuss, because no such question is here presented. The indictment charges, not the manufacture of "beer," but the manufacture of beer containing as much as one-half of one per cent. of alcohol. This qualification and restriction upon the word "beer" (assuming for the sake of the argument merely that the use of the word beer alone would have been sufficient to have charged an offence), entirely destroys and nullifies any implication which it might be argued the unqualified use of the term would justify, and renders it impossible for the Court to say, as matter of law, to which of the classes contemplated by the statute, beer containing as much as one-half of one per cent. belongs. For, unless this Court can take judicial notice of the percentage of alcohol which renders a given beverage either intoxicating or non-intoxicating it cannot know into which class the beverage mentioned in the indictment falls.

The rules of criminal pleading laid down by this Court require that "The crime must be charged with precision and certainty and every ingredient of which it is composed must be accurately and clearly alleged." *Evans v. United States*, 153 U. S. 584, 587.

This Court, speaking through Mr. Justice Brown, i
the case just cited, said:

> "Even in cases of misdemeanors the indictmen
> must be free from ambiguity and leave no doubt i
> the minds of the accused and the court of the exac
> offence intended to be charged, not only that the for
> mer may know what he is called upon to meet, bu
> that upon a plea of former acquittal or convictio
> the record may show with accuracy the exact offenc
> to which the plea relates." (p. 587.)

See, further,

> *Moore v. United States*, 160 U. S. 274;
> *United States v. Carll*, 105 U. S. 608, 613;
> *United States v. Simmons*, 96 U. S. 360;
> *United States v. Hess*, 124 U. S. 483.

We submit that the proper construction of the Act o
November 21, 1918, renders unlawful the manufacture
and sale of intoxicating liquors only, and that under th
rules of criminal pleading the allegations of the indict
ment are not sufficient to charge the defendant with th
manufacture of an intoxicating liquor. The District
Court was therefore correct in sustaining the demurrer
to the indictment.

WAS THE ACT OF NOVEMBER 21, 1918, CAPABLE OF BEING CONSTITUTIONALLY ENFORCED ON THE 4TH DAY OF JUNE, 1919?

The date upon which the indictment charges the alleged
offence to have been committed is the 4th day of June,
1919. This was seven months, lacking a few days, from
the signing of the Armistice between Germany and the
powers associated with the United States in the prosecu-
tion of the war, and after the President of the United
States had addressed Congress, in the course of which,
after reading the terms of the Armistice, he solemnly
stated: "The war thus comes to an end; for having

accepted these terms of armistice, it will be impossible for the German command to renew it."

Between the date of the signing of the Armistice and the date of the finding of this indictment, the terms thereof had been substantially complied with, and Germany and Austria had been in fact disarmed. The German navy had been surrendered and sunk. All hostilities had ceased immediately upon the day of the signing of the Armistice and for nearly seven months the United States had been with all possible speed demobilizing its army and its navy.

The President on May 20, 1918, had declared in his Message to the Congress:

> "The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers."

In view of these indisputable facts, the only ground upon which it can possibly be contended that the Act of November 21, 1918, was operative as of the date of this indictment, is that demobilization of the army had not been entirely completed. Such a contenton must go to this extreme: That notwithstanding the fact that hostilities have altogether ceased, that the enemies have been subdued and their empires disrupted, Congress retains the power to override the ordinary powers of the States, and subject the entire population of the country to regulations respecting their personal habits, prescribed by Congress, merely upon the ground that some part of the army raised to carry on war upon foreign soil has not been demobilized. But the contention goes even further. It means, if the construction of the statute advanced by the Government is correct, that Congress could not only at the time in question, and in the then peaceful state of the country, regulate the manufacture and sale of intoxicating liquor, but it had the power to regulate

the sale and manufacture of all non-intoxicating beverages as well. Every drink, no matter how nutritious and how absolutely devoid of all harmful properties it might be, would by this extension of power be brought within the regulatory power of Congress.

Certainly at a time when there is no existing emergency of war, there can be no constitutional warrant for the exercise of such a sweeping power by Congress, an exercise of power which is destructive of all the fundamental principles of our dual form of government.

No one denies the power of Congress to enlist every resource of men and treasure in the waging of a war in which it is engaged. But the mere existence of a technical state of war, or the mere doing of some particular thing consequent upon the termination of war cannot of itself justify the subversion of the state governments. When the United States is engaged in war, all impeding power of the States must give way. But there must be a conflict *in fact* between some *exercise* of power pursuant to war, and the ordinary powers of the states, before the powers of the latter are required to give way. Bearing in mind the dual nature of our government as recognized and perpetuated by the Constitution, is not something more than a *technicality* required to suspend or nullify the operation of those principles which lie at the very foundation of that form of government. Whatever may be said as to the extent of the power of Congress with respect to the regulation of the manufacture and sale of intoxicating liquor during the period when some actual operation having to do with the prosecution of war is in progress, it must always be a question whether even at such a time Congress can prohibit, upon the ground of general welfare and apart from some real and definite purpose having a substantial relation to the prosecution of war, the manufacture and sale of harmless non-intoxi-

cating beverages. The relation in such a case between a prohibition of that sort and the prosecution of war is so fanciful as scarcely to be regarded as a reasonable relation at all in the constitutional sense.

The doctrine of *Ex Parte Milligan*, 4 Wall. 1, we submit, is controlling here. It was there announced that,

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary for its existence; as has been happily proved by the result of the great effort to throw off its just authority" (p. 120).

The reserved rights of the States are as clearly and solemnly guaranteed by the Tenth Amendment, as the rights of liberty and property under the other amendments and provisions of the Constitution. These reserved rights can only be invaded or suspended in time of war when the Federal Government is actually exercising some authority with which the reserved powers of the States are in conflict. The conflict must be real, not imaginary, for the States cannot lightly be shorn of their just powers.

We submit that to hold that the Act of November 21, 1918, prohibits the manufacture and sale of non-intoxicating malt liquors would render that Act unenforceable as of June 4, 1919, the date named in the indictment as that upon which the alleged offence was committed.

But even if this Court should not agree with us in this, we submit that to adopt such a construction of the Act

would at least raise grave doubt as to the constitution
ality of the Act. This Court has said that,

> "A statute must be construed if fairly possible
> so as to avoid not only the conclusion that it is un
> constitutional, but also grave doubt upon that score."
>
> *United States v. Jin Fuey Moy*, 241 U. S. 394
> 401.
>
> *United States v. D. & H. Co.*, 213 U. S. 366.

The construction for which we have contended, we sub
mit, is not only the one which the language of the statut
demands, but is the one which should be adopted, becaus
the only other construction suggested, namely, that con
tended for by the Government, would raise a grave doub
with respect to the constitutionality of the Act.

CONCLUSION.

For the reasons above discussed it is submitted that
the indictment found in this case does not allege an
offence under the Act of November 21, 1918, and that the
judgment of the District Court of the United States for
the District of Maryland should be affirmed.

Baltimore, December 3, 1919.

WILLIAM L. MARBURY,
RANDOLPH BARTON, JR.,
WILLIAM L. RAWLS,
Counsel for Defendant in Error

APPENDIX A.

Act of Congress Approved November 21, 1918.

An Act to enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes, provides in part as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any *distilled spirits,* and during said time no *distilled spirits* held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the *manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.* After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and threafter until the termination of demobilization, the date of which shall be determined and proclaimed by

the President of the United States, *no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.* The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act *no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States* during the continuance of the present war and period of demobilization: *Provided,* That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: *Provided,* That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, *to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones,* and that any violation of the President's regu-

lations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further,* That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress)."

APPENDIX B.

PROCLAMATION AND EXECUTION ORDER of January 30, 1919, modifying proclamation of September 16, 1918, so as to permit the manufacture of beverages which are not intoxicating, viz.:

"Whereas, under and by virtue of an Act of Congress entitled 'An Act to Provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and . el,' approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

'Now, therefore, I. Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortgae of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods,

fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this thirtieth day of January in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of March 4th, 1919, further modifying proclamation of September 16th, 1918, so as to declare that "there is now an abundant supply" of food products, and limiting prohibition of food used in the production of intoxicating malt liquors for beverage purposes, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President on the 16th day of September, 1918, made a proclamation containing the following prohibition:

'I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And, whereas, the President, under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

'Whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

'Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.'

"And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

"Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words 'production of' the word 'intoxicating' and by striking out of the same sentence the words 'including near beer'; and by inserting in the succeeding sentence in both places where the phrase 'production of malt liquors' occurs, after the words 'production of' the word 'intoxicating,' and striking out the phrases 'including near beer' and 'whether or not such malt liquors contain alcohol' in both places in that sentence where these phrases occur, so that as amended the prohibitory provisions of said proclamation shall read as follows:

'That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxicating malt liquors for

beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol.'

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this 4th day of March in the year of Our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred and Forty-third.

(Signed) WOODROW WILSON.

FRANK L. POLK,
Acting Secretary of State."